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IN THE

Supreme Court of the United States

October Term, 1963.

No. 307.

MABEL V. ROMAN, Clerk of the Peace for New Castle County; WALTER A. HANDSBERRY, Clerk of the Peace for Kent County; I. ROBERT WILLEY, Clerk of the Peace for Sussex County; et als.,

Appellants,

v.

RICHARD SINCOCK, et als.

On Appeal From the United States District Court for the District of Delaware.

RECORD APPENDIX TO BRIEF FOR THE APPELLEES.

(Cited as "Sincock App.")

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 307

MABEL V. ROMAN, CLERK OF THE PEACE FOR NEW CASTLE COUNTY; WALTER A. HANSBERRY, CLERK OF THE PEACE FOR KENT COUNTY; I. ROBERT WILLEY, CLERK OF THE PEACE FOR SUSSEX COUNTY; ET ALS., APPELLANTS,

v.

RICHARD SINCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

RECORD APPENDIX TO BRIEF FOR THE APPELLEES.

(Cited as "Sincock App.")

1. PRE-TRIAL ORDER, JANUARY 7, 1963.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE.

CIVIL ACTION No. 2470.

RICHARD SINCOCK, ET AL.,
Plaintiffs,

v.

WILLIAM DUFFY, JR., ET AL.,
Defendants.

The following is a pretrial order submitted by the plaintiffs' attorneys in accordance with the provisions of Rule 11 of the Civil Rules of the United States District Court of Delaware adopted pursuant to Rule 83 of the Federal Rules of Civil Procedure.

A. THE NATURE OF THE ACTION.

1. The suit at bar is a class action brought by the plaintiffs on their own behalf and on behalf of all other persons similarly situated. The plaintiffs assert that they are residents of four representative districts and four senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State and citizens of the United States. The defendants comprise the Boards of Canvass, the Clerks of Peace, the Departments of Election and their Secretaries, of New Castle, Kent and Sussex Counties, respectively, and the State Election Commis-

sioner, all of whom perform statutory and constitutional duties relating to the general elections in the State of Delaware.

2. The plaintiffs contend that the provisions of Section 2 of Article 2 of the Constitution of Delaware of 1897, which provides for the apportionment of the State of Delaware into thirty-five representative districts and seventeen senatorial districts and for equal representation in the General Assembly for each district, denies to the plaintiffs the right of equal suffrage pursuant to Article 1, Section 3 of the Constitution of Delaware of 1897, and also denies to them equal protection of law under the Fourteenth Amendment of the Constitution of the United States of America. The plaintiffs further contend that the provisions of Article 2, Section 2 violate several Federal Civil Rights Acts because it denies them of the rights, privileges and immunities guaranteed by the Constitution of the United States. The plaintiffs also contend that the apportionment of the members of the General Assembly of Delaware by geographical units as provided in Section 2, Article 2 of the Constitution of the State of Delaware of 1897, debases and dilutes their voting rights, and ask the Court to declare the same to be unconstitutional and invalid for each reason. The plaintiffs further ask this Court to enjoin defendants from conducting, canvassing or otherwise engaging in any general election for the election of members of the House of Representatives or of the Senate pursuant to the provisions of Section 2, Article 2 of the Constitution of Delaware of 1897 or in the alternative to enter an order directing the conduct of the general election of November 6, 1962 to be held on an at-large basis. This Court in accordance with its opinion of September 14, 1962 refused to enjoin the election as requested by the plaintiffs. The plaintiffs further have asked this Court to enter an order reapportioning the representation of the House of Representatives and the Senate

in accordance with the population of the State and in accordance with Section 3, Article 1 of the Constitution of the State of Delaware to provide for free and equal elections and to provide such other relief as might be appropriate.

3. The defendants have filed answers but, in replying to many vital allegations of the complaint, have asserted that they do not possess sufficient knowledge or information as to many of the vital allegations. Some of the defendants admit the accuracy of the allegations as to population figures set out in paragraphs 21 to 25 inclusive of the complaint, which are supported by the exhibits attached to the complaint and those admitted into evidence. Some of the defendants contend that the present election districts are justified by historical, economic, geographic and topographic factors. The Chancellor of Delaware and the Judges of the Superior Court of the State of Delaware, all members of the Boards of Canvass, state in their answers that as judicial officers serving in ministerial capacities they deem it inappropriate to take a position on the merits of this lawsuit, but aver that as Chancellor of Delaware or as Judges of the Superior Court they will continue to discharge the duties imposed upon them by the Constitution of the State of Delaware unless restrained by a lawful order of this Court.

4. On July 25, 1962 the Court stayed the proceedings until August 7, 1962 in order to permit the 121st General Assembly to take such action as it deemed appropriate by way of amendment to Section 2, Article 2 of the Constitution of Delaware of 1897. On July 30, 1962 the General Assembly enacted a proposed amendment to the Constitution of Delaware, now embodied in H. B. 574, which, if agreed to by the 122nd General Assembly, would amend Section 2 of Article 2 of the Constitution to provide a new

composition of the House and Senate of the General Assembly. Publication of the proposed amendment has been made in accordance with Section 1, Article XVI of the Constitution.

5. On August 7th the defendants moved for a further stay, and on August 8th the plaintiffs moved for a preliminary injunction.

6. On October 8th the plaintiffs amended the prayers of their complaint to ask the Court provisionally to reapportion the House of Representatives and the Senate, and to declare H. B. 574 to be unconstitutional for the same reasons as asserted for the invalidation of Section 2 of Article 2 of the Constitution of the State of Delaware. On October 14, 1962 this Court denied both motions and set the matter down for a pretrial hearing on November 13, 1962 announcing that a time will be set for trial on the merits as soon thereafter as may be feasible after consultation with counsel.

7. The matter, therefore, comes before this Court on the complaint and amended complaint of the plaintiffs, and the answers of the defendants. By agreement of counsel The Honorable William Duffy, President Judge of the Superior Court, has been substituted for The Honorable Charles L. Terry, former President Judge of the Superior Court, and The Honorable George R. Wright, Associate Judge of the Superior Court, has been added as a defendant.

B. The Constitutional or Statutory Basis of Federal Jurisdiction.

1. This suit was brought under 28 USCA 1343 (62 stat. 932, as amended); which provides that district courts shall have original jurisdiction of any civil action authorized by law, to be commenced by any person to redress the deprivation, under color of any state or statutes of any

right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens, and to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. It was further brought under 42 USCA 1983 (17 stat. 13 as amended) which provides redress to every person who, under color of any statute of any state is deprived of the rights, privileges or immunities secured by the Constitution. The composition of the Court is that which is established by the provisions of Title 28, USCA, et seq. (62 stat. 968) providing for the establishment of a district court of three judges in all cases in which an injunction is sought to restrain the enforcement or operation of any state statute alleged to be unconstitutional.

2. The suit seeks a declaratory judgment under Title 28, USCA 2201 (Title 28, USCA 1940, as amended), as well as an interlocutory injunction and a permanent injunction invalidating the provisions of Article 2, Section 2 of the Constitution of the State of Delaware of 1897, and the provisions of H. B. 574 in so far as they relate to the election of the members of the House of Representatives and the Senate of the General Assembly of the State of Delaware and, in the case of H. B. 574, in so far as it relates to the composition of future constitutional conventions. The validity of Section 2, Article 2 and of the provisions of H. B. 574 is presently before this Court. Cf. Sims v. Frank, 205 F. Supp. 245 (D. C. Ala. 1962). (See Opinion of this Court dated October 14, 1962.)

C. Statements of Facts Which Are Admitted and Require No Proof.

1. The plaintiffs are residents of four representative districts and four Senatorial districts of the State of Delaware and are duly qualified voters and taxpayers of the State of Delaware and citizens of the United States.

2. The defendants comprise the Boards of Canvass, the Clerks of Peace, The Departments of Election and their Secretaries of New Castle County, Kent and Sussex Counties, respectively and the State Election Commissioner, all of whom perform statutory and constitutional duties relating to the general election in the State of Delaware.

3. The legislative power of the State of Delaware is vested in a General Assembly consisting of a Senate and a House of Representatives. (Article 2, Section 1 of the Constitution of the State of Delaware of 1897.)

4. The composition of the House and Senate of the General Assembly was established by the provisions of Article 2, Section 2 of the Constitution of the State of Delaware of 1897. This section divides the State of Delaware into 35 geographical representative districts and provides that the qualified electors of each district shall elect one representative. This section also divides the State of Delaware into 17 geographical Senatorial districts from each of which a Senator is chosen by the qualified electors thereof.

5. Article 2 Section 2 of the Constitution of the State of Delaware of 1897 created 15 representative districts, numbered one to fifteen inclusive, in New Castle County; 10 representative districts, numbered one to ten inclusive, in Kent County and 10 representative districts, numbered from one to ten inclusive, in Sussex County.

6. Article 2 Section 2 of the Constitution of the State of Delaware of 1897 established seven senatorial districts, numbered one to seven inclusive, in New Castle County, five senatorial districts, numbered one to five inclusive, in Kent County and five senatorial districts, numbered one to five inclusive in Sussex County.

7. The apportionment of the State of Delaware into the above representative and senatorial districts was the result of a Constitutional Convention convened at Dover,

Delaware on December 1, 1896 for the purpose of revising the Constitution of the State of Delaware of 1831. As a result of such constitutional convention the present known as the Constitution of the State of Delaware of 1897 containing, inter alia, Section 2, Article 2 became effective June 10, 1897 and remains in full force and effect.

8. The Constitution of the State of Delaware of 1897 contains no provisions for Initiative or Referendum. It contains no requirements for periodic reapportionment. Thus, reapportionment within the framework of the Constitution can be accomplished only by either a constitutional amendment to Article 2, Section 2 or by means of a Constitutional Convention called for the purpose of adopting, inter alia, reapportionment of the General Assembly.

9. At the time of the adoption of the Constitution of the State of Delaware of 1897 as aforesaid the population of the State of Delaware was approximately 180,000 inhabitants, of which approximately 105,000 persons resided in New Castle County, 70,000 of whom resided in the City of Wilmington, and 35,000 resided in rural New Castle County. Kent County had a population of 32,000 and Sussex County a population of 38,000. (Page 273 . . . "Population of Delaware Table 1"—Plaintiffs' Exhibit #3 to the Dolan deposition . . .)

10. At the time of the adoption of the Constitution of the State of Delaware of 1897 the inhabitants of rural New Castle County, Kent County and Sussex Counties were considered to be identical insofar as their occupations and vocations were concerned and population was substantially equal and accordingly each county was apportioned to the then existing population so that each rural area had ten representatives in the House of Representatives and five Senators in the Senate of the Delaware General Assembly. The City of Wilmington with a popu-

lation of 70,000 persons was accorded special consideration and was allotted five representatives in the House of Representatives and two Senators in the Senate of the General Assembly of the State of Delaware (Vol. 3: *Debates and Proceedings of the Constitutional Convention of the State of Delaware*, pp. 2008-2112; 2029-2031).

11. By April 1, 1930, according to the 15th Census of the United States, the population of the State of Delaware had increased to 238,380 inhabitants which represented an increase of 15,374 or 6.9% as compared with the population on January 1, 1920 (15th Census of the United States: 1930, published by the United States Department of Commerce, Bureau of the Census—Plaintiffs' Exhibit #4 to the Dolan Deposition).

12. In 1930 New Castle County had grown to 161,032 inhabitants of which 106,597 resided in the City of Wilmington, 54,435 resided in rural New Castle County, while Kent County had a population of 31,841 and Sussex County had a population of 45,507 (see pages 4 and 5 of the Exhibit referred to in the preceding paragraph).

13. By 1960 the total population of the State of Delaware had increased to 446,292 inhabitants of which 307,446 resided in New Castle County. Of these inhabitants, 95,827 resided in the City of Wilmington and 211,619 resided in rural New Castle County. In the same year 65,651 persons resided in Kent County and 73,195 persons inhabited Sussex County (United States Census of Population, 1960, published by the United States Department of Commerce, Bureau of Census—Plaintiffs' Exhibit #2 to the Dolan Deposition).

14. The populations of the 35 representative districts established by the existing apportionment, provided in Article 2, §2 of the Constitution of the State of Delaware of 1897, for the years 1890 through 1960, are as follows:

New Castle County Dist.	1890	1900	1910	1920	1930	1940	1950	1960
1					11,513	12,262	11,515	7,814
2					31,299	35,082	35,762	33,772
3					21,222	22,843	21,417	18,359
4					9,352	9,877	9,078	5,394
5					31,446	32,440	32,584	30,488
Total Wilm.	61,431	76,508	87,411	110,168	106,597	112,504	110,356	95,827
6	3,994	3,899	4,440	6,451	10,917	14,426	24,039	58,228
7	6,144	4,736	6,038	6,298	14,317	18,696	32,224	47,509
8	3,786	3,728	3,886	4,052	4,453	5,662	7,677	23,428
9	2,870	3,061	3,587	3,921	5,476	6,398	9,057	20,040
10	5,980	5,407	5,406	6,386	8,261	10,245	21,824	40,293
11	2,126	1,999	1,797	1,692	1,881	1,970	2,599	9,325
12	2,216	2,425	2,693	2,351	2,635	2,771	3,053	3,401
13	4,785	4,455	4,237	3,596	3,457	3,685	4,554	5,218
14	2,336	2,141	2,257	2,099	1,939	2,035	2,175	2,534
15	1,514	1,338	1,436	1,225	1,099	1,170	1,321	1,643
Total					54,435	67,058	108,523	211,619
Total NCC	97,182	109,697	123,188	148,239	161,032	179,562	218,879	307,446
Kent County								
1	4,372	4,228	3,627	3,521	3,229	3,506	4,422	6,084
2			3,046	2,623	3,133	3,530	4,248	17,806
3	2,885	3,144	3,032	2,831	2,586	2,527	2,671	3,361
4			2,709	2,439	2,292	2,502	2,555	3,716
5			3,771	3,927	4,363	5,169	6,052	9,125
6		1,242	2,941	2,500	2,352	2,284	2,168	2,626
7			3,252	3,229	3,393	3,745	3,838	7,880
8			3,331	3,000	3,040	3,200	3,269	5,168
9			3,945	3,920	4,043	4,288	4,418	4,956
10	3,364	3,118	3,067	3,033	3,410	3,700	4,229	4,929
Total:			32,721	31,023	31,841	34,441	37,870	65,651
Sussex County								
1	3,913	4,117	5,060	5,079	5,276	5,936	7,254	9,641
2	2,793	3,456	5,329	4,589	4,329	5,315	5,849	6,439
3	3,223	3,779	5,174	5,346	5,182	6,350	7,815	9,437
4	3,074	3,132	3,352	2,761	2,955	3,448	4,446	5,318
5	4,511	5,112	5,980	6,362	6,319	6,804	7,139	8,140
6	3,495	3,575	4,979	4,513	4,836	5,779	6,470	8,010
7			4,770	4,016	4,755	5,415	6,195	6,623
8			1,884	1,821	1,803	1,864	2,536	2,957
9	2,436	2,874	3,028	3,071	3,062	3,456	3,563	4,271
10	2,997	3,959	6,857	6,183	6,990	8,135	10,069	12,359
Total:			46,413	43,741	45,507	52,502	61,336	73,195

(Table 5 Population of States and Territories by Minor Civil Divisions; 1890 and 1900, Delaware (Form 12 Census of the United States, Population, Volume I); 15th Census of the United States: 1930, Population Bulletin, First series Delaware, Number and Distribution of Inhabitants; 1960 Census of Population, Number of Inhabitants, Delaware, Final Report P. C. (1)—9A—Plaintiffs' Exhibits 2, 3, 4, 5, 10, 11 and 12 to the Dolan Deposition.)

15. That the mathematical computations set out in paragraphs 21, 22, 23 and 24 relating to the disparity of vote and representation in the various representative districts respectively are true, accurate and correct; that as a result of the change in population the representative districts range in size from 1,643 inhabitants of the New Castle 15th District of Blackbird Hundred to 58,228 inhabitants of the New Castle 6th Representative District of Brandywine Hundred, thus producing a circumstance where a vote in the 15th Representative District is equal to that of the 6th Representative District of New Castle County, although the population of the latter district is more than 35 times that of the former. Furthermore, 18 representative districts with the least population and containing only 18.47% of the state's population may elect a majority of the members of the House of Representatives. The inhabitants of the 18 least populated representative districts is less in number than the two districts having the heaviest concentration of population, the smaller, however, electing 18 representatives in the House of Representatives and the latter electing 2 representatives in the House of Representatives of the Delaware General Assembly. In accordance with the 1960 Census, more than one-half of the entire population of the state of Delaware, 233,718 persons, live in six representative districts and the representatives of such districts have the same voting power in the General Assembly as those representatives of but 16,552 persons residing in the 6 least populous representative districts of the State of Delaware.

16. A similar situation exists with regard to the Senatorial Districts established by the Constitution of 1897, where 7 senators are apportioned to New Castle County, which had a population in 1960 of 307,446 inhabitants as compared with 5 senators in Kent County, having a population of 65,651 inhabitants, and with Sussex County having 5 senators, with a population of 73,195 persons. Of the 7 senators from New Castle County, 5 represent the rural area, having a population of 211,619 inhabitants. The City of Wilmington with a population of 95,827 inhabitants, as contrasted with Kent and Sussex Counties, is allotted 2 senatorial representatives in the General Assembly, as contrasted with 5 for each of the county geographical units.

17. The 17 senatorial districts established by Article 2, § 2 of the Constitution of the State of Delaware of 1897 vary greatly in the number of inhabitants residing therein. The population of these districts from 1930 through 1960, with the percentage of change in each, is as follows:

		Population				% Change		
County	*Dist.*	*1930*	*1940*	*1950*	*1960*	*1940/ 1930*	*1950/ 1940*	*1960/ 1950*
New Castle	1	52,521	57,925	57,089	52,131	+ 10	— 1	— 9
	2	54,076	54,579	53,177	43,696	+ 1	— 3	— 18
	3	12,778	16,856	28,228	64,345	+ 32	+ 67	+ 128
	4	16,909	21,928	35,712	64,820	+ 30	+ 63	+ 81
	5	16,372	19,414	33,934	63,734	+ 19	+ 75	+ 88
	6	5,338	5,655	7,153	14,543	+ 6	+ 26	+ 103
	7	3,038	3,205	3,496	4,177	+ 5	+ 9	+ 19
Kent	1	6,362	7,036	8,670	23,890	+ 11	+ 23	+ 176
	2	4,878	5,029	5,226	7,077	+ 3	+ 4	+ 35
	3	7,756	8,914	9,890	17,005	+ 15	+ 11	+ 72
	4	6,395	6,562	6,586	7,582	+ 3	—	+ 15
	5	6,450	6,900	7,498	10,087	+ 7	+ 9	+ 35
Sussex	1	9,605	11,251	13,103	16,080	+ 17	+ 16	+ 23
	2	8,137	9,798	12,261	14,755	+ 20	+ 25	+ 20
	3	11,155	12,583	13,609	16,150	+ 13	+ 8	+ 19
	4	6,558	7,279	8,731	9,580	+ 11	+ 20	+ 10
	5	10,052	11,591	13,632	16,630	+ 15	+ 18	+ 22

(Lieberman and Rosbrow, "The Delaware Citizen" Welfare Council, "Population of Minor Civil Divisions (Representative Districts) in the Counties of Delaware, 1950 and 1960".)

18. The 17 senatorial districts established by Article 2, § 2 of the Constitution of 1897 range in size from approximately 70,000 to approximately 4,000. The vote in the General Assembly of the smallest senatorial district is equal to that of the largest senatorial district which exceeds it in population by more than 17 times. The apportionment established by the Constitution with respect to the Senate permits 22% of the voters of the State of Delaware to elect a controlling majority in the Delaware Senate.

19. The material result of the uneven growth of the different areas of the state has created a condition wherein the number of inhabitants in representative and senatorial districts differ not only on an inter-county basis but also adheres on an intra-county basis. It further manifests itself even among the representative districts of the City of Wilmington, thus in the House of Representatives the 4th Representative District of Wilmington, having 5,394 inhabitants, has the same representation in the House as the 2nd Representative District with 33,772 inhabitants and the 5th Representative District having 30,488 inhabitants.

20. Subsequent to the filing of this action the General Assembly of the State of Delaware enacted House Bill 574 which purports to amend Article 2, § 2 of the Constitution of the State of Delaware of 1897. The Bill, which was enacted by the 121st General Assembly has been duly published and if enacted by the 122nd General Assembly would constitute an amendment to Article 2, § 2. In effect, it proposes the following:

(a) The creation of two additional senatorial districts in Kent and Sussex Counties increasing the total number

of senatorial districts throughout the state from 17 to 21, which would give 7 senators to each of the 3 counties.

(b) It creates approximately 20 additional representative districts by dividing the larger districts and by providing for additional representation for each increment of 15,000 population residing therein or any major fraction thereof.

(c) It provides further that the composition of any future Constitutional Convention, as provided in Article 16, § 2 of the Constitution of the State of Delaware of 1897, shall be made of the present representative districts plus 2 delegates from each county.

(d) It provides that the Governor and the chairman of the 2 major political parties shall serve as a reapportionment committee to apply the formula provided in the Bill after every Federal Decennial Census.

21. House Bill 574 would result in a House of Representatives composed as follows:

Dist.	*Pop.*		*Effect of House Bill No. 574*	*Average Population Per Representative*
1	7,814		Unchanged	7,814
2	33,772	City	Add 1 Representative	16,886
3	18,359	of	Unchanged	18,359
4	5,394	Wilm.	Unchanged	5,394
5	30,448		Add 1 Representative	15,244
6	58,228		Add 3 Representatives	14,557
7	47,509		Add 2 Representatives	15,836
8	23,428		Add 1 Representative	11,714
9	20,040		Unchanged	20,040
10	40,293		Add 2 Representatives	13,431
11	9,325		Unchanged	9,325
12	3,401		Unchanged	3,401
13	5,218		Unchanged	5,218
14	2,534		Unchanged	2,534
15	1,643		Unchanged	1,643

22. Through the provisions of House Bill 574 no reapportionment of the House of Representatives would occur in either Kent or Sussex Counties, resulting in the perpetuation of disparities between districts in Kent County of 7 to 1 and disparities in Sussex County of 4 to 1. In New Castle County, the disparities would amount to as much as 12 to 1.

23. House Bill 574 would result in a Senate composed as follows:

Dist.	*New Castle County*		*Effect of House Bill No. 574*	*Average Population Per Senate Dist.*
1	52,131		Unchanged	
2	43,696		Unchanged	
3	64,345		Unchanged	
4	64,820		Unchanged	
5	63,734		Unchanged	43,921
6	14,543		Unchanged	
7	4,177		Unchanged	
Total	307,446			
KENT COUNTY				
1	23,890		Unchanged	
2	7,077		Unchanged	
3	17,005		Unchanged	
4	7,582		Unchanged	9,378
5	10,097		Unchanged	
6		46,063		
7		19,584		
Total	65,651			
SUSSEX COUNTY				
1	16,080		Unchanged	
2	14,755		Unchanged	
3	16,150		Unchanged	10,456
4	9,580		Unchanged	
5	16,630		Unchanged	
6		38,975		
7		34,220		
Total	73,195			

24. Giving effect to House Bill 574 the population disparities between districts in New Castle County in the 7 senatorial districts would range from 4,177 in the 7th Senatorial District to 64,820 inhabitants in the 4th Senatorial District, or a ratio of better than 16 to 1. In Kent County the population disparities between districts range from 7,077 inhabitants in the 2nd Senatorial District to 46,063 in the 6th Senatorial District, or a ratio of approximately 6½ to 1, and in Sussex County the population disparities between districts range from 9,580 in the 4th Senatorial District to 38,000 in the 6th Senatorial District, or a ratio of better than 4½ to 1. The average population for each senatorial district in the three counties would range from 43,921 inhabitants in New Castle County for each senator elected therein to 9,378 persons in Kent County, or a ratio of better than 4½ to 1 between the counties.

25. The election of 7 senators to each county irrespective to population, creates a situation where Kent County with but 14.4% of the total state population will elect 1/3 of the Senate and Sussex County with but 16.6% of the total state population will elect 1/3 of the Senate. New Castle County with 61% of the total state population will also elect 1/3 of the Senate.

26. House Bill 574 adds two at-large senatorial districts in both Kent and Sussex Counties. Thus, residents of New Castle County would be entitled under House Bill 574 to vote for and elect 1 senator in the General Assembly of the State while the inhabitants of both Kent and Sussex Counties will elect 2 senators to represent them in the General Assembly of the state. The inhabitants of each senatorial district in New Castle County would elect a 1/21st part of the Senate, while inhabitants of each senatorial district of Kent and Sussex Counties would elect 2/21st of the Senate. New Castle County inhabitants number 307,466 or 69% of the total state population would

elect 1/3 of the Senate as would the 65.651 inhabitants of Kent County and the 73,195 residents of Sussex County, representing but 31% of the total state population.

27. House Bill 574 further provides that in the event a Constitutional Convention be called, as provided in Article 16, § 2 of the Constitution of 1897, the number of delegates and the method of electing them to such convention shall not be affected by the addition of representatives or representative districts created by House Bill 574 and that for the purpose of future Constitutional Conventions, the representative districts shall elect delegates thereto and shall remain as before.

28. Plaintiffs have introduced into evidence, a chart showing the collections by the Delaware State Tax Commission for the decade 1952 through 1961, which was received by the Court (Plaintiffs' exhibit #4). In such decade the State Tax Commission has collected a total of $239,000,000., of which $166,900,000.00 represented personal income taxes, $23,500,000.00 represented inheritance and estate taxes, $10,800,000.00 represented license fees and $16,200,000.00 represented cigarette tax collections. The State Tax Commission reports indicate that in excess of 92% of the total taxes have been collected in New Castle County in that period, that 3% were collected in Kent County and 5% were collected in Sussex County. Of the $166,900,000. collected for personal income taxes, approximately 92% were collected in New Castle County, 3% in Kent County and 5% in Sussex County. Of the $23,500,000. collected for inheritance and estate taxes, approximately 94% were collected in New Castle County, 2% in Kent County and 4% in Sussex County. Of the $10,800,000. collected for licenses, approximately 70% were collected in New Castle County, 12% in Kent County and 18% in Sussex County. Of the $16,200,000. collected by the Commission for cigarette taxes in the decade, approximately

72% were collected in New Castle County, 8% were collected in Kent County and 10% were collected in Sussex County.

29. The plaintiffs also introduced into evidence a chart showing the collections by the Delaware State Tax Commission based upon the same ten year total which was broken down to illustrate the amount of taxes collected by each of the three counties in accordance with their representation in the General Assembly (Plaintiffs' exhibit #3). This chart showed that in the ten year period of 1952 to 1961, the total amount of collections made by the Delaware State Tax Commission, excluding the franchise and corporation taxes, averaged approximately $13,000,000. per representative in New Castle County, less than $1,000,000. for each representative in Kent County and approximately $1,000,000. for each representative in Sussex County. This exhibit further shows that with regard to personal income taxes collected, New Castle County collected approximately $10,500,000. for each representative in the General Assembly, that Kent County collected less than $500,000. per representative in the General Assembly and that Sussex County collected approximately $800,000. per representative in the General Assembly.

30. Prior to the institution of this suit and the subsequent enactment of House Bill 574, the General Assembly of the State of Delaware in the six years prior to the institution of such suit, received approximately seven bills having as their object the reapportionment of the State of Delaware by either Constitutional Convention or Constitutional amendment. Prior to the inception of this action, each one of these bills, with the exception of one which was introduced by Senator Elwood M. Melson, failed to emerge from Committee. The Melson bill providing for reapportionment was voted out of the Senate Committee but was defeated. (Affidavits of Representative Robert N.

Downs, Representative T. Lees Bartleson, Senator Margaret R. Manning and Senator Reynolds du Pont)

31. Giving further effect to House Bill 574, Kent and Sussex Counties with 31% of the total state population will be able to control measures requiring a two-thirds vote in the Senate, including revenue measures and appointments by the Governor and will be able to override the executive veto.

32. In addition to the foregoing, plaintiffs and defendants admit the veracity of the facts contained in the affidavits which have been filed in support of their respective positions. They do not, however, admit the conclusions stated therein.

33. Representation strictly according to population is a comparatively new historical concept (D 57).

34. In many bodies similar to state legislatures, there is representation according to factors other than population (assemblies of other nations, Congress of the United States, the General Assembly of the United Nations, the House of Lords in England) (D 57).

35. One of the traditional concepts of state government in the United States is political area representation (D 92). Political area representation is used as a means of apportioning representation in legislative groups on an international and national basis, a state basis and a city basis (D 91). This would also be true on a county and local basis for example, New Castle County, Delaware (D 92).

36. Most of the states have representation in one of their houses, usually the Senate, on a county or political area basis (D 92).

37. The formation of representative districts in state government is normally the function of legislative branch of the government.

38. The prevailing theory of government in the United States is a bi-cameral system (D 90).

39. As to the unicameral system, the one in Nebraska was adopted in 1937 and although there have been attempts in approximately fifty per cent of the states since 1936, none has followed it (D 90).

40. The three lower counties on the Delaware River, part of William Penn's Colony, had a separate organization from any other colony. There was a legislature which met in the colonies and passed legislation for them which could be approved or disapproved by the representative of the governor of Pennsylvania (D 32).

41. In 1704, the three lower counties separated completely from the Province of Pennsylvania except for the governor-general (D 63).

42. The people who resided in the three counties joined together in 1776 and created an organization completely independent of the colony and the Commonwealth of Pennsylvania (D 63, 84). Delaware was not formed by the United States (D 84). For at least one hundred years prior to 1776 the counties had been in existence (D 82, 84).

43. From time to time there was a colonial assembly and later a state assembly or legislative body for the three lower counties on the Delaware River in which there was equal representation from each one of the three counties (D 63, 64). That persisted until the Constitution of 1897, having been embodied in the agreement of 1776, the Constitution of 1792 and the Constitution of 1831 (D 64).

44. In 1896 the population of the three counties, excluding Wilmington, was approximately equal (D 107). The Constitution of 1897 varied the pattern of equal representation from the three counties by adding five representatives for New Castle County and two for the City of Wilmington (D 64). The basis for this addition is not clear from the constitutional debates.

45. One part of Delaware is somewhat hilly and the other part is flat. This difference in topography, including proximity to a good harbor in the northern part of the state, among other factors, helped shape industry.

46. Pursuant to State Statutes, the counties exercise the following legislative functions or rights (D 96):

(a) To assess and levy, collect and receive taxes (D 93). 9 Del. C. § 8601, et seq.

(b) To appropriate and borrow money (D 94). 9 Del. C. §§ 4111, 4131, 4133, 1522, 1561, 1563, 6111, 6131, 6132, 6205.

(c) To establish pension plans for employees (D 94). 9 Del. C. § 1701, et seq.

(d) To appropriate money for the indigent sick (D 94). 9 Del. C. §§ 1801, 4204, 6205.

(e) To appropriate money for welfare purposes (D 94).

(f) In New Castle County to designate firemen and policemen. 9 Del. C. § 1903.

(g) To provide an ambulance and rescue service (D 94). 9 Del. C. § 2001.

(h) To name the policemen (D 95). 9 Del. C. § 1903.

(i) To exercise their duty with respect to ambulance and rescue services (D 95). 9 Del. C. § 2001, et seq.

(j) To supervise street and highway lighting if the taxable people within the area petition it; in that event the

Levy Court acts as a holding company to make the proper contract (D 95). 9 Del. C. § 2101.

(k) General supervision over sidewalks, fire hydrants, water mains, sanitary and drainage sewers, when fifty per cent or more of the taxable people in a certain area petition that this be done (D 96). 9 Del. C. § 503.

(l) To control garbage and refuse collection and disposal thereof (D 96). 9 Del. C. § 2401.

(m) As to New Castle County, jurisdiction with respect to planning and zoning (D 96). 9 Del. C. § 2601.

(n) Certain jurisdictional authority with respect to parks and recreation. 9 Del. C. §§ 610, 616.

47. The Register of Wills, Prothonotary, Sheriff, Coroner and Recorder of Deeds carry out the general state laws under the county government (D 96). 9 Del. C. § 9101 et seq., § 9502, et seq., § 9603, et seq.

48. In the colonial days the Levy Court had the power to administer alms houses, and were until 1935 overseers of roads. They also had the power to tax but did not make the general laws (D 132).

D AND E. THE PLAINTIFFS AND DEFENDANTS APPEAR TO AGREE THAT THERE ARE NO PURE QUESTIONS OF FACT WHICH REMAIN TO BE LITIGATED AND THAT THE FOLLOWING MIXED QUESTIONS OF LAW AND FACT REMAIN.

First as to the Plaintiffs—

1. Does the apportionment provided in Article 2, § 2 of the Constitution of the State of Delaware of 1897 constitute a rational apportionment or an invidious discrimination as to the plaintiffs within the purview of the Fourteenth Amendment of the Constitution of the United States?

2. Is there any rational basis or policy for the classification of representative districts and senatorial districts

or any rational policy for the existing representation disparities under § 2, Article 2 of the Constitution of the State of Delaware of 1897?

3. Does the apportionment provided in House Bill 574 constitute a rational apportionment or an invidious discrimination as to the plaintiffs within the purview of the Fourteenth Amendment of the Constitution of the United States?

4. Is there any rational policy for the representative disparities in the representative and senatorial districts contained in House Bill 574?

5. Does gross discrimination against the value of the legislative vote of the plaintiffs exist?

6. Does gross discrimination against the value of the legislative vote of residents exist between districts in the same county and between residents of adjoining districts whose status, living conditions and social characteristics are the same?

7. Is there any rational policy—a policy which provides for the protection of equal laws—apparent in the adoption of the enactment of House Bill 574?

8. Is there any rational basis or statement of policy in House Bill 574 to justify the allocation of senatorial districts so that there is equality of the number of senators among the counties and the two senators from each of the two southern counties run from districts overlapping those of the other five senators in such counties?

9. Is there any justification for the establishment in Delaware of the so-called Federal plan of legislative apportionment modeled on the United States Constitution for the United States Congress?

10. Does the representation in the General Assembly meet the tests of the due process or the equal protection clause of the Fourteenth Amendment of the Federal Constitution with regard to taxation of the citizens of the several counties and the City of Wilmington?

11. If the apportionment in Article 2, § 2 of the Constitution of the State of Delaware of 1897 constitutes invidious discrimination as to the plaintiffs, must not the provisions in House Bill 574 providing for the composition of future Constitutional Conventions also constitute an invidious discrimination as to the plaintiffs?

12. Whether both or either of the Houses of the Delaware General Assembly must be reapportioned.

13. What plan of reapportionment, if any, should be adopted?

F. List of the Exhibits.

The plaintiffs have introduced in evidence and will refer in the course of the trial to the following exhibits:

Exhibit 1—The deposition of Paul Dolan taken by the plaintiffs on July 18, 1962, to which are attached the following:

(1) Compendium on Legislative Apportionment.

(2) U. S. Census Population, 1960.

(3) Population, Delaware, Table 1.

(4) 15th Census, U. S. 1930.

(5) 1960 Population, Delaware.

(6) Exhibit A to Complaint.

(7) Exhibit B to Complaint.

(8) Page 226, "Government in the 50 States."

(9) Exhibit C to Complaint.

(10) Chart, Average Values of Vote for Representation as Percentages of State-Wide Average.

(11) Chart, Representation General Assembly of Delaware.

Exhibit 2—Affidavit of Honorable Elisha Dukes, Secretary of the State of Delaware re publication of House Bill 574.

Exhibit 3—Chart of collections by Delaware State Tax Commission.

Exhibit 4—Chart of collections of the Delaware State Tax Commission by county 1952-1961.

Exhibit 5—Chart of the population in each senatorial district.

Exhibit 6—Affidavit of Representative T. Lees Bartleson.

Exhibit 7—Affidavit of Senator Margaret R. Manning.

Exhibit 8—Affidavit of Senator Reynolds du Pont.

Exhibit 9—Affidavit of Representative Robert Downs.

Exhibit 10—Affidavit of Elwood Melson, Jr.

Exhibit 11—Affidavit of Sigmund Schorr.

Exhibit 12—Affidavit of Edwin W. Hutchinson.

Exhibit 13—Affidavit of A. Dean Betts.

Exhibit 14—Affidavit of Harold J. Carrow, Sr.

The above exhibits have been admitted in evidence for the purpose of final hearing.

G. Names and Addresses of Witnesses.

At the present time, plaintiffs expect to call as witnesses in the presentation of their case in chief the following persons:

(1) Professor Royce Hanson—American University, Washington, D. C.

(2) Dr. Paul Dolan—University of Delaware, Newark, Delaware.

(3) Cornelius B. Tyson—613 Halstead Road, Sharpley, Wilmington, Delaware.

(4) Cecil Liberman—835 Orange Street, Wilmington, Delaware.

Professor Hanson is an Assistant Professor of Government and Public Administration at the American University, Washington, D. C. He is the chairman of the Security Committee on State and Urban Studies and is engaged in teaching the following specialized areas:

(a) State Government

(b) Urban and Metropolitan Problems

(c) National Government and Politics

(d) American Political Theory

He is an authority on the subject of apportionment.

Professor Dolan is a professor of political science at the University of Delaware and is qualified as an expert in political science and apportionment.

Cecil Liberman is a political writer associated with the News Journal Company, Wilmington, Delaware. He has written a series of articles on apportionment and reapportionment in the State of Delaware and has, in conjunction with Mr. James Rosbrow, authored "The Delaware Citizen".

Mr. Tyson is an expert in the field of Taxation.

The defendants expect to produce Professor Harold B. Hancock, Professor of History at Otterbein College, Westerville, Ohio.

H. A Brief Statement of What Plaintiffs Expect to Prove in Support of Their Claim.

The plaintiffs expect to prove that Article 2, § 2 of the Constitution of the State of Delaware of 1897 invidiously discriminates against them by the dilution of their voting franchises insofar as it relates to general members of the State of Delaware. They will further show that House Bill 574 does not cure such invidious discrimination but instead perpetuates the same.

The plaintiffs have thoroughly briefed their position in this litigation and believe that a more detailed statement of its position in this Pre-Trial Order is not required. The current apportionment provisions of Article 2, § 2 of the Constitution of the State of Delaware of 1897 and the apportionment provisions contained in House Bill 574 operate so as to deprive plaintiffs and all others similarly situated of their rights and privileges without the due process of law and the equal protection of law.

I. A Brief Statement of What Defendants Intend to Prove as Their Defense.

The Defendants expect to prove—

1. That the apportionment established in Article 2, § 2 of the Delaware Constitution of 1897 and under House Bill 574 is rational and not invidiously discriminatory.

2. Both of the Houses of the Delaware General Assembly need not be reapportioned.

3. Any reapportionment of either House of the Delaware General Assembly need not be based upon population alone but other factors may be considered.

J. Statements by Counterclaimants or Crossclaimants.

None.

K. Amendments of Pleadings Desired by Any Party.

None.

L. Whether or Not the Possibility of Settlement Has Been Discussed.

The plaintiffs and defendants have discussed settlement.

M. Any Other Matters Which the Parties Deem Appropriate.

All parties reserve the right to object on grounds of lack of relevancy and/or materiality with respect to any fact contained herein.

N. This Order shall supplement the pleadings and govern the course of trial unless modified by the Court to prevent manifest injustice.

/s/ John Biggs, Jr.,
Chief Judge of the Court of Appeals.

/s/ Caleb M. Wright,
Chief Judge of the U. S. District Court.

/s/ Caleb R. Layton, III,
Judge of the United States District Court.

Approved:

/s/ VINCENT A. THEISEN,
Vincent A. Theisen,

/s/ VICTOR F. BATTAGLIA,
Victor F. Battaglia,
Attorneys for Plaintiffs.

/s/ JANUAR D. BOVE,
Januar D. Bove, Attorney General,

/s/ JAMES H. HUGHES, III,
James H. Hughes, III,

/s/ N. MAXSON TERRY,
N. Maxson Terry,

/s/ ROBERT W. TUNNELL,
Robert W. Tunnell,

/s/ FRANK O'DONNELL,
Frank O'Donnell,

/s/ WARREN B. BURT.
Warren B. Burt.

Dated January 7, 1963, at
Wilmington, Delaware.

2. EXCERPTS FROM THE TRANSCRIPT OF TESTIMONY.

(34)*

DR. PAUL DOLAN

[*Professor of Political Science, University of Delaware, called as a witness on behalf of the Plaintiffs, being duly sworn, testified as follows:*]

DIRECT EXAMINATION.

By Mr. Theisen:

Q. Dr. Dolan, what are the concepts which you as a political scientist in the science of government in the light of the equal protection clause of the 14th Amendment would require in any apportionment scheme in a legislature?

A. I would say that the legislature should be based on population; that the general axiom of one man, one vote should prevail.

By Judge Biggs:

Q. I didn't grasp that, Professor Dolan.

A. That if you had a population of a state and you were to have, let us say, 52 representatives, then you would divide the 52 into the total population and you'd come up with a quota, and you would try to establish in the geographical areas that so many people would have one vote in the legislature.

Judge Biggs: Thank you.

By Mr. Theisen:

Q. In other words, Dr. Dolan, if you had ten seats that you were going to apportion and you had a thousand popu-
(35)
lation——

A. 100 to each.

Q. You would try to allocate one seat to each 100 persons?

* Figures in parentheses refer to page numbers of typewritten transcript.

A. Yes, as nearly as you could. Of course, exactitude is very difficult to get.

Q. There are some deviations that you political scientists recognize from absolute equality in proportions?

A. Yes. One is the difficulty of mathematics. Another is the difficulty of change from a decennial period.

By Judge Wright:

Q. Dr. Dolan, are you speaking now of both Houses?

A. Of both Houses, yes, sir.

Q. It should be on a population basis?

A. The population basis should be the controlling thing. There may be some other factors for other postulates that would enter, but basically in my opinion it would be that both houses would have population as their cardinal base.

(36)

Q. What protection under your theory would there be for minority representation?

A. By minority representation you mean——

Q. I mean racial or economic groups.

A. Racial or economic groups?

Q. Racial, economic, or otherwise.

A. I feel that the representation should be across the board and that there are certain factors, economic, racial, and other minority factors that will appear generally throughout the State or the area that is being apportioned. They may not appear in the same preponderance one place to another.

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(37)

Q. Isn't that one of the things that should be considered in a state legislature insofar as the Senate is concerned if there is to be a bicameral system?

A. If I may, sir, in going back to the concept of the Federal Government, there was a unique situation there in that there were sovereign states that somehow through their peoples joined into a Federal union. I do not mean to infer that the Federal Constitution was formed by the states. It was formed by the people of the United States. However, at the state level we have a different scheme of government. This is unitary government and it may well be that the Federal analogy could be badly taken.

Q. It could well be, but I am asking this specific question: Is not one of the objects of the bicameral legislature, whether it be in Delaware or whether it be, for example, in a country such as Sweden where there is a bicameral House,

(38)

that the bicameral House, which is usually the smaller group, is taken on a district system which does not bear the same relation to population as that of the more representative House?

A. Yes, this is quite true. For example, I would say the Rhode Island situation is often mentioned, certain islands off the coast which may not have the population in the full sense that a representative district would have on an equal basis, yet they get representation, the fact of their location and proximity to the state capital. The same thing, I think, has been true in the Michigan case where some representation was accorded to the districts lying in the peninsula.

Q. Isn't that a desirable principle?

A. If the situation would be the same in the State of Delaware where you have these outlying areas then I perhaps would see this, yes; but with the smallness of the state that we have here and easy communication and lack of distance, I fail to see the need for other factors, although I would not be adamant and say they should not apply.

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(44)

Q. Dr. Dolan, what discrimination, if any, did you find in the representation that was given according to districts in 1897?

A. Well, for one, the district representation in the

(45)

15th District of New Castle County, there were 1,514 people. They received one vote in the legislature, in the lower House. And in the City of Wilmington, which received five votes, there were 61,000 people. So that if that were divided evenly by 5 and you came up with some 12,000 persons per vote in the City of Wilmington, there was a disparity there between any one of those districts in the City of Wilmington and the 15th.

Q. Well, isn't that disparity evident all the way through the remaining 30 districts of the State when you compare them with the districts in Wilmington?

A. Yes. The disparity lessens of course in some places.

Q. Was the same thing true in the Senate?

A. Yes. I don't have the exact figures here, but in view of the fact——

Q. Would the allocation of two Senators to the City of Wilmington out of 17 represent discrimination or non-discrimination with regard to Wilmington?

A. It would represent discrimination.

Q. Now, then, from your examination of the constitutional debates of 1897 could you find any reason, any rationale, for the discriminations that were perpetuated or drawn into this Constitution?

(46)

A. I could find none.

Q. Could you find any logical pattern evident in the division of the State, the reapportionment of the State, into

the 35 representative districts, in the 17 Senatorial districts?

A. I could find none. Having re-read those things in preparation for the case, I still cannot come to any basic assumptions which are adhered to throughout in the apportionment scheme. This is why I say it is irrational.

Q. Now, then, starting with what you consider to be an irrational situation in 1897 and referring you to Plaintiffs' chart No. 10, does this indicate an increase or a decrease in the discrimination which you found existed?

A. An increase in the discrimination.

Q. Throughout the years?

A. The imbalance has become more so as the years have gone on.

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(47)

Q. Now, I call your attention to the 1st District in Wilmington, which is roughly 8,000, and your attention to the 2nd District of Wilmington, which is roughly 34,000 in population and ask you if there is any rational reason for that discrimination between those two districts?

A. To me it is irrational. I see no reason for the discrimination.

• • •

By Mr. Theisen:

Q. I ask you this as a political scientist, not as an individual, but as a political scientist, can you find any rational basis for that discrimination?

A. I cannot.

Q. Can you find any rational basis for the discrimination between Districts 4 and 3, which are beside each other, in the City of Wilmington?

A. No, I cannot.

(48)

Q. Can you detect any rationale for the discrimination between 4 and 5 in the District?

A. I cannot.

Q. Can you find any rationale or pattern or reason for the discrimination which currently exists in the 6th Representative District as contrasted to the 5th which is right next to it?

A. I cannot.

Q. Can you find any rational pattern or reason for the discrimination between the 15th District and the 6th District which is 35 times in size?

A. No. The answer is the same. There is no basis for this in the Constitution.

* * *

(54)

By Mr. Theisen:

Q. Now, then, Dr. Dolan, did you follow the enactment of House Bill 574 and the enactment of House Bill 3 as they passed from the bi partisan committee through final passage on Thursday of last week?

A. Yes, I did.

Q. I call your attention to Plaintiffs' Exhibit 16 and ask you if you have examined that chart which purports to be the proposed districts in the State Senate as set up

(55)

by the new amendment?

A. I have.

Q. Is it a true and accurate representation of the population of each one of those districts?

A. Yes.

Q. Now, one of the provisions of the new amendment was to create two additional Senators for both Kent and Sussex Counties; is that not correct?

A. Yes.

Q. The amendment increased the size of the Senate from 17 to 21, did it not?

A. Yes.

Q. You stated you followed the passage. Do you know of any rational basis on which you could place the establishment of those two additional Senators in Kent and Sussex County as a political scientist?

A. No, I do not.

* * *

(56)

Q. Do you notice that under the amendment to the Constitution the 15th District of New Castle County which

(57)

now we have numbered 25, because there will be 25 districts in all, and I point to it specifically, Doctor—Is it true that that will remain at the figure of 1,643 inhabitants for a representative seat?

A. During this next census, yes; during this next decade, yes.

Q. And will always remain, will it not, until what figure is reached?

A. Until 22,500——

Q. And 1?

A. And 1, yes, sir.

Q. On this chart we have indicated that the districts will range from the 1,643 in what will then be the 25th District or the old 15th, to the 20,000 in the 17th District, which is the old 9th District and which has 20,040 inhabitants, which, as I have calculated it, is a disparity of, I believe, 12½ to 1. Is there any rational basis that you know of for such a deviation?

A. I find none.

Q. Do you find any rational basis for the deviation in the 5th District which has a population of approximately

6,000 as contrasted with the one immediately next to it, the 4th, which has a population of approximately 18,500?

A. I do not.

(58)

Q. Is the same thing true, Dr. Dolan, with regard to the districts that are to be found now in Kent and Sussex Counties which remain as they were before?

A. Yes, the same thing is true.

Q. So that insofar as your observations were concerned with the two lower counties' seats in the House of Representatives your testimony is precisely the same under this amendment as it was under Article 2, Section 2; is that not right?

A. Yes. The disparity may not be as great between some of the districts in New Castle County.

Q. In the county itself it remains the same; is that correct?

A. Yes.

Q. And those disparities are 7 to 1 in Kent County and 4 to 1 in Sussex; is that correct?

A. That is right.

Q. You were about to tell the Court your views with regard to the representation in the Senate under the new bill.

A. Yes, with respect to Kent and Sussex Counties, your Honors, these two so-called super-Senatorial districts are made up under present House Bill 574, now the amended Constitution, they are made up of specified districts, and counsel read those districts. Suppose any one of those representative districts did reach the figure of 22,501, it would be

(59)

split. Now, into what super-Senatorial district would that split be fitted? This I have not been able to find out and there is no provision for it made in the Constitution as far as I know—the amendment. That is what I had in mind.

By Judge Wright:

Q. This is an amendment to the Constitution?

A. Yes.

Q. Why didn't they just make two districts down there and if they wanted to have representation on the west side and the east side why didn't they just go ahead and put a representative district on the west side and a representative district on the east side in new districts?

A. I thought about this, but I could not come up with an answer.

Q. There would have been at least some rationale in that, do you agree?

A. Well, if I may, sir, I don't see it if there are no super-Senators in New Castle County. If the two down-state counties are treated separately from New Castle then the basis is not on county——

Q. Maybe I should have used the word "logic" instead of rationale.

A. They mean the same to me, sir.

(60)

By Mr. Theisen:

Q. Dr. Dolan, as a political scientist is there any rational basis whatsoever that you can think of for giving a county area having 65,651 inhabitants two additional Senators as opposed to another county area, if you will, having 307,000 in population?

A. No, I can't see any. That was the point of my previous answer.

Q. And the same would be true of Sussex County with a population of 73,000 as opposed to New Castle County with 307,000?

A. Yes.

(61)

Q. As a political scientist is there any justification for applying the Federal analogy to the State of Delaware?

A. No, and I don't see how you could apply it to any

(62)

State in the Union.

Q. Your reasons are what?

A. The states are unitary governments. They are a competency within the Federal system of government as is the Federal Government a competency. But to give the counties a sovereignty would be to create a third competency, and this would be unconstitutional.

By Judge Biggs:

Q. What do you mean by the word "competency"?

A. The ability to control the internal police power of the district. It corresponds perhaps with the word "sovereignty".

Q. You mean police or policy?

A. When I say "police" I mean the ability to maintain the order of the community without interference or without authority from some other competency or constituency or sovereignty, if you will. I dislike to use the word "sovereignty" here because I don't think the states are sovereign in the sense that England or the United States is sovereign or sovereign one to each other.

Q. Without being too semantic about this, your point is, as I take it, that you can see no basis why New Castle County or Kent or Sussex, treating them as individual counties, should have any greater power to determine policy than

(63)

any other of the two counties?

A. What I meant was that they do not determine policy in and of themselves within their own borders.

Q. Their territorial limits?

A. That is right. They get their authority from the State Legislature, whereas the State of Delaware does not

get its authority from the Federal legislature or from the Federal Constitution.

By Mr. Theisen:

Q. As a matter of fact, under our system of state government what is the position of a county?

A. A county is a political sub-division.

Q. From what source does it derive its power?

A. From the State Legislature.

Q. And what the State Legislature gives it can certainly take away?

A. It can abolish it.

Q. A county might be wiped out by state action?

A. Could a county wipe out a state?

A. No. I would like to qualify the first statement: If there is in the Constitution certain provisions about home rule for counties then the legislature itself could not eliminate the county.

(64)

By Judge Biggs:

Q. But barring constitutional prohibition the State Legislature could in fact abolish counties?

A. Yes, and has done so. There are at least two states, I think, in the American union that have no counties in them.

Q. What are those two?

A. I think one is Alaska and the other is Connecticut. I am not sure, sir.

Q. I think you are correct as to Alaska. I was not sure as to Connecticut.

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(67)

By Mr. Theisen:

Q. Professor Dolan, returning to the amendment to the Constitution and referring more specifically to the

State Senate which you have discussed, is it now true that under the amendment a resident of New Castle County will vote for one Senator and that a resident of Kent County will vote for and elect two Senators?

A. He may not elect them. He will vote for them, yes.

Q. The same is true in Sussex?

A. Yes.

Q. Well, presupposing that there will be two candidates for the Senate, a resident of Kent and Sussex County will each elect two Senators; is that correct?

A. Yes.

Q. So that under the amendment a resident of New Castle County would be voting for one-third of the Senate representation?

A. That is correct.

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Q. With 70 per cent of the population of the State; Kent County with 65,000 out of a total population of 446,000 would now be voting—each voter would be voting for and hopefully electing two Senators, and the same would be true of Sussex County with 68,000?

A. Each county would elect a third of the Senatorial representation.

Q. Is there any rational basis for this in the field of political science that you know of?

A. I see none under this set-up. It does not take into consideration the disparities in the population at all.

Q. Dr. Dolan, you have written several books on government in Delaware?

A. Just two.

Q. You have been a member of the faculty at the University of Delaware and you have traveled quite extensively, have you not, throughout the length and breadth of Delaware?

A. Yes.

Q. Do you find any great disparity in the kind of people you find in Sussex County as compared with the people you find in the northern part of the State?

A. You mean disparity between the two?

Q. Do you find any great difference?

A. No, I can't tell one from another.

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(78)

Q. Dr. Dolan, this morning when we talked about the amendment to the Constitution I had questioned you about both the House and the Senate make-up under the new bill, the new Constitution. I had neglected, however, to ask you another very important question relating to the make-up of all future constitutional conventions.

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Mr. O'Donnell: The complaint in this action is not directed at constitutional conventions, therefore any questions with respect to the same would be irrelevant.

Judge Biggs: We will take it subject to a motion to strike.

Mr. Theisen: Your Honors remember that at some——

Judge Biggs: We made the ruling. Go ahead and ask it.

Mr. Theisen: All right.

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By Mr. Theisen:

Q. Section 6 of the amendment provides in substance that the number of delegates and the method of electing delegates to the constitutional convention as provided in Section 2, Article 16 of the Constitution of 1897 shall not be effected——

It should be "affected."

—by addition of representatives or representative districts pursuant to Section 2A of the bill.

In other words, the representative districts which shall elect delegates to any future constitutional convention shall remain as they were prior to the amendment in old Article 2, Section 2?

A. That is my understanding. Yes.

(80)

Q. Do you care to comment upon that phase of the bill?

A. I fail to see the rationale of the present constitutional convention with its 41 members based as it is, 35 of them on districts, which were the old districts, and the 6 other members coming two from each county.

I fail to see how that is connected with the new apportionment. For example, if we took the 9th District, it has 20,000 inhabitants, it is entitled to one representative seat. If that by some chance were to be split into two or more districts that second, or third, or fourth district hewn from the original one would not send a man to the constitutional convention. The district would then, that sent the man to the constitutional convention, would have to be in a way reconstituted; it would have to come back to the old 9th. I don't understand how this will be done. It would still place, then, the constitutional convention on a purely geographical base.

Q. If we took for example, the old 6th District,

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which under the amendment adds three representatives to that district, as I understand the bill that old 9th District is divided in some way into four districts, one, I suppose, is the 9th, and then the bill says additional new representative districts shall be created.

A. Yes.

Q. Do you know how those new representative districts are to be created?

A. Well, they are to be established, I understand, under this constitutional amendment by a commission which will be—which will divide the old district on a proportional basis into new districts following ancient boundary marks, etcetera, contiguity, without any attempt to gerrymander or disproportional.

Q. What becomes of the old district?

A. Apparently it is in limbo until a constitutional convention is called, and it is reconstituted, as I understand it.

Q. This is despite subsequent divisions of new districts and so forth?

A. This could go on, yes, ad infinitum.

Q. And if a constitutional convention were to be called, the delegates would then be selected from the old district which was established in 1897?

(82)

A. That is my understanding, yes.

Q. Is there any rational basis as a political scientist for such treatment?

A. I see none.

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Q. Under such a call for a constitutional convention would there be true representation of the population of the State?

A. No.

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(86)

By Mr. Theisen:

Q. Professor Dolan, if the amendment to the Constitution is permitted to stand and if in effect 30 per cent of the population of the State in the Senate is to control two-

thirds of the majority of the Senate and that 70 per cent of the population is to get but one-third representation, what is the effect of such a set of circumstances upon the conduct

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of the Senate vis-a-vis the conduct of the House of Representatives?

A. Well, it gives preponderant power to the 30 per cent of the population. The Senate would be two-thirds in the hands of 30 per cent of the population, and the Senate, as you know, has power in addition to that of the House. It makes confirmations. Also under the Constitution now existing municipalities are created by two-thirds vote, or laws affecting municipalities by two-thirds. This would give the Senate equal power, of course, with the House but much greater power to the 30 per cent whom it represented. Constitutional change is a two-thirds vote.

I think one other point might be mentioned, and that is that it detracts from some of the powers that are given to the House as such. The House has to do with the initiation of money bills. This is a prerogative of the more populous representative bodies, more popularly elected representative bodies, and in a way it would place the Senate in a position to control, I think, pretty much a money bill—overweaningly so because it has more power in that sense than the House would. The House would be based on a quasi-population basis—at least one of the bases would be population, it might be inferred—but the Senate, not being so, but with a two-thirds power, would probably be able to contravene the

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House on money bills.

Q. Taking into account, Professor Dolan, your experience in government in this State and writing about it, your study of the Constitution of 1897, the broad general make-

up of the State of Delaware, considering its population, can you telll us as a political scientist whether in your opinion the Senate of the General Assembly of this State should be based upon a population basis?

A. I think that one of the controlling bases for both Houses is population, Senate as well as the House.

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DR. ROYCE HANSON

[*Associate Professor of Government and Public Administration at the American University, Washington, D. C., called as a witness on behalf of the Plaintiffs, being duly sworn, testified as follows:*]

Direct Examination.

By Mr. Theisen:

Q. Now, Professor Hanson, are you familiar with the apportionment of representation in the Delaware General Assembly as provided in Article 2, Section 2, of the Constitution of 1897?

A. Yes, I am.

Q. And are you also aware of the apportionment provided in the recent amendment to that Section?

A. Yes.

Q. Have you also examined the debates of the Constitution of 1897?

A. Yes, I have.

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Q. Have you examined and are you familiar with the census reports of the United States Department of Commerce dating from 1890 to 1960 insofar as it relates to the State of Delaware?

A. Insofar as they are stipulated in your pre-trial order, yes.

Q. Are you familiar with the content of the pre-trial order?

A. Yes.

Q. Have you examined it?

A. Yes, I have.

Q. Now, Dr. Hanson, as a political scientist working in the field of reapportionment would you care to state to the Court the basic concepts which you as a member of the political science field are familiar with and state also the basic concepts which are applied under the equal protection clause of the 14th Amendment insofar as they both relate to schemes of reapportionment?

A. Well, first, the overriding consideration in apportionment is the relationship of representation to population, to people. I think, after seeing that there is a reasonable, or close relationship between population and representation, one would look, if there are legislative districts or are to be legislative districts, for such criteria as the

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compactness of the districts and the contiguity of the territory of which they are composed.

As to the second part of your question, the equal protection clause requires that in the things to which it applies, there be no invidious discrimination. The equal protection clause permits a state to establish classifications of persons or things if the law which establishes that classification is in the first instance a permissible state policy.

It requires in general that any distinction among classes created by the law be such as not to result in invidious discrimination, nor can they be drawn in such a way that in the first instance it is apparent on their face that their purpose is to invidiously discriminate.

Finally, it would provide that there may be no distinctions among those similarly situated within the same class, that if persons are put in the same class they may not be treated differently, nor may the class be drawn in such a

way that persons obviously of the same type or same class are arbitrarily assigned to separate classes.

Q. Doctor, have you applied those tests, those basic concepts, to the population figures to be found in pages 12 and 13 of the pre-trial order that is before this Court?

A. Yes.

Q. And have you examined the chart that we have pre-

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pared which sets forth the 1960 population figures insofar as they relate to both the House and the Senate of the General Assembly?

A. Yes, but I can't see it all from here.

(Mr. Theisen then moved the chart for the witness.)

Doctor, going back first, if I may, to the convention of 1897 and the stated population figures that existed as of that date, may I ask you if you are familiar with those population figures?

A. Yes, I am. I have them here.

Q. More specifically I call your attention to page 9 of the pre-trial order where it appears that in 1897 there were 180,000 inhabitants, of which 105,000 resided in New Castle County, 70,000 of whom resided in the City of Wilmington and 35,000 resided in rural New Castle County, 32,000 in Kent County, and 38,000 in Sussex County.

A. That is correct.

Q. Applying the concepts that you have referred to a moment ago to those population figures, do you find any rational policy within the concept of the 14th Amendment in the apportionment that was adopted by the Constitutional Convention of 1897?

A. Well, I can't see any rationality within this context in assigning—first, my answer has to be divided into two

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parts. First, assuming that the assignment of representatives was to the counties. Now, on that assumption itself

it would not appear, or there is nothing that appears rational in giving New Castle County 15 and each of the other counties 10. This certainly cannot be justified on the basis of proportions in order of population. The justification given in the debates, as I recall, was that rural New Castle had approximately the same population as Kent and Sussex and consequently should have about the same representation or should have the same representation. The disparity was not enough to bother anyone.

This, up to this point, would appear to be both reasonable and rational within the applications of equal protection. But then when you come to the next step of giving the five additional representatives to New Castle, they are awarded in such a way that they all fall within the City of Wilmington, which had in itself a population equal to the combined populations of Sussex and Kent and almost exactly twice the population of rural New Castle. Now, if there is any rationality to that, I can't find it. The only thing that can conceivably cross my mind on it is that because they have got twice as much population, they get half as much representation. But this does not follow.

I think even if you assume the method applied to

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the rural counties, this does not follow, that is, if you assume that the assignment is made to the counties. But the assignment, as I read the Constitution, is not made to the counties but is made to 35 representative districts.

Now, these 35 representative districts, even based on the 1890 census which you have on pages 12 and 13, in rural New Castle County you find variations roughly of 1 to 5, or at least 1 to 4, as between the 15th District and the 17th District of rural New Castle County.

You find in Sussex County not very great variations—perhaps 1½ to 1—one approach is 2 to 1, but I guess it is closer to 1½ to 1. But even in rural New Castle there is

no systematic consistent method for assigning these representatives that has any relationship to population.

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Q. Is it your conclusion, Doctor, that the Constitution of 1897, in providing for the apportionment in the House, as we have mentioned, did not provide a rational plan in the

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14th Amendment sense?

A. I think that would be correct. If that were applied to the situation as existed then, I should not think that it would meet these tests.

Q. Now, then, may I ask you next about the apportionment in the Constitution of 1897 insofar as it related to the Senate.

A. Yes.

Q. You will recall that the Constitution provided for 17 Senatorial Districts throughout the State?

A. Yes.

Q. 7 of which were to be located in New Castle County, 5 in each of the other two counties?

A. That is right.

Q. Have you examined the Constitution in the light of that apportionment?

A. Yes, and I think the same thing can be said for the apportionment of the State Senate. I think in your statement of facts——

Q. I call your attention to pages 14 and 15, just to help you.

A. Yes. On page 15, for example, in New Castle County in 1930, which was the earliest census figure that you have here, the 7th Senatorial District had 3,038 people, and the

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2nd Senatorial District had 54,076. You can find disparities of lesser range in the other counties.

* * *

Q. That is correct. Let me ask you this: In 1897, where you had 70,000 population in the City of Wilmington and you assigned to it two Senators and you had a rural population in New Castle County of 35,000 and you assigned to it five Senators, 32,000 in Kent County with five Senators and 38,000 in Sussex County with five Senators, applying the basic concepts that you have referred to in your testimony with regard to the House, do you care to comment on the apportionment of the Senate under the 1897 Constitution?

A. Well, again first assuming that the apportionment of Senators was made to counties, certainly New Castle had more population than Kent and Sussex and should have had more Senators. It had considerably more, though, if you use population as your base—it should have had more than seven Senators.

(160).

Obviously population then was not the basis of the apportionment. Both from the debates and from the effect it is obvious that county equality was not the criterion that was used. I doubt that county equality is an acceptable criterion in any event. But even if it were, it was not used as the basis since one has seven and the other two five.

Within New Castle County there is no discernible criterion if you consider New Castle a class in itself or giving two Senators to a population of 70,000 and five to a population of 35,000.

* * *

Q. Now, then, Doctor, calling your attention to Plaintiffs' Exhibit No. 10, which is a population of Delaware,

1890 through 1960, State and counties, totaled by decade, starting at 1890, and calling your attention to the progression through 1960, what has been the position of the

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New Castle County representation during the years?

A. New Castle County's representation has stayed the same; so has the representation of Kent and Sussex. The representation was frozen. In a sense what the 1897 Constitution does is to create a constitutional minimum and leave it at that, a constitutional freeze, and arbitrarily assigns a certain number of Senators and Representatives to each county or arbitrarily draws lines around a territory and assigns one each to these lines. This is a sort of a silent gerrymander which means as the population within these boundaries has increased there has been no representative outlet for this increase in population. It has been constitutionally fixed and there has been no way to change this short of changing the Constitution.

Q. So that would you say that as the population of the State increased this fixed geographical unit that was selected as the representative district would necessarily result in silent gerrymandering?

A. It would not necessarily result in it if you had no population changes and you were fair to start with; but you have had population changes and it has necessarily resulted in silent gerrymandering of quite large proportions.

I think you get in the House the 15th District, as your facts state, has around 1,600 people, and another dis-

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trict has 58,000. This is on the order of 35 to 1. You get a disparity on the order of 17 to 1 in the State Senate.

The history has been no change was made in the district boundaries, the disparity increased.

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Q. I call your attention to the Delaware State Senate proposed districts by population, House Bill 574, and ask you, please, to ignore the 6th and 7th Districts in Kent and Sussex Counties.

A. Yes.

Q. Does that chart, with the exception of those districts, represent the apportionment in the State Senate that existed in 1960?

A. Yes.

Q. What are the discrepancies you find in it?

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The Witness: There are discrepancies of two types; one is the range of discrepancy, the total range of discrepancy, between districts, again 17 to 1 between the smallest and largest in New Castle.

I don't think the average number of people per Senator in the counties is very meaningful here because they are not elected on the basis of counties, but that would be a discrepancy in itself.

Thirdly, within Kent and within Sussex between one district and another you find considerable variation between one district and another.

By Mr. Theisen:

Q. Would you, Doctor, as a political scientist, classify these as grossly disproportionate?

A. I think that is apparent.

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Q. Based upon the 1960 census, and taking into account the House and Senate as it then remained under Article 2, Section 2, do you have any idea of how Delaware ranked as a state in the fifty states of the Union?

A. Well, one of the scales that is commonly used to rank the representativeness of legislatures, which is a scale devised upon the percentage of the population that it takes to control both Houses, to elect a majority of both Houses of the legislature, it would rank about 48th, or third from the

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worst.

Q. Third from the worst.

By Judge Biggs:

Q. Whom do you consider the worst?

A. Rather "least representative" would be the more appropriate phrase. Florida, your Honor.

By Mr. Theisen:

Q. Now, Doctor, have you also considered the amendment to Article 2, Section 2?

A. Yes. 574?

Q. Yes. Would you care to comment on the amendment 574 and what it has done to the Legislature of our State?

A. Well, 574, the amendment, retains the existing 35 districts as the basis of the representative system, and as I think Dr. Dolan explained, it then takes only those districts which exceed 15,000 in population and awards to those districts alone additional representatives when the population reaches a second or third or fourth 15,000 population or a major fraction of that.

Now, what this means in the House of Representatives of Delaware is that in application as against the 1960 census of these districts, that instead of 35 districts 45 districts would exist. For the future there would be no limit on the size of the House but it would grow as the population

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increased. I think just a rough extension of population trends would indicate that by 1970 the House under this

plan would reach somewhere around, well, somewhat probably between 55 and 60 members. This is given a continuation of existing trends.

The bill, or the amendment, rather, changes the mathematical situation a little bit as a measurement of representativeness. For instance, New Castle County would have 25 of the 45 seats, which would give it I believe roughly 55 per cent of the House as against 41 per cent, I think, of the House under Article 2, Section 2.

The difference in the number of people that it would take living in the smallest districts, starting from the smallest and coming up, to control the House, as against Article 2, Section 2, where 18 per cent of the people living in the 18 smallest—or—yes, 18 per cent living the smallest districts control, it would raise that percentage to 28 per cent living in the 23 smallest districts, or roughly it would take 10 per cent more than now.

But still you are confronted with the fact that 70 per cent of the people live in one county of the three counties of the State.

This is also accompanied by some rather glaring disparities in the ratio of population to representation oc-

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casioned by the failure of 574 to combine the smaller districts up to the 15,000 mark, or even a major fraction of 15,000. So that you retain in New Castle County under this bill disparities on the order of 12 to 1, and, what is more, it would appear, again looking at population trends, and assuming even one small district on the order of 2,000 people, that this amendment would build into the Constitution some constant disparities on the order of 10 or 12 to 1.

Now, this is a disparity within New Castle County itself and is probably the place where the disparity would remain the greatest. But then in Kent County, where nothing was done at the present time under the terms of

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the bill, the 7 to 1 disparity remains, and the 4 to 1 or 4½ to 1 disparity remains in Sussex County, again in the case of districts that are adjoining.

Now, the other feature of this bill, the Senate section of the bill, I suppose it is salutory that this is to some degree increased representation. But this to me at least is offset by the decrease of representation, the relative decrease of representation, in the Legislature afforded New Castle County by virtue of adding two Senators each to Kent and Sussex to districts that overlap existing Senatorial districts, and they are based on representative districts, but of course they overlap Senatorial districts as well.

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Now, this situation means that the extent of the gross disparity, the 17 to 1 total disparity, remains in the Senate; this is unchanged because all of the existing Senatorial districts are retained and only four new super-districts are added.

Under Article 2, Section 2, it took eight districts to control, and these eight districts contained 22 per cent of the population. Now, under 574, the amendment, it will of course take 12 districts to control. But it is interesting, I think, to observe that these 12 districts actually include the territory that was in the old nine districts because three of the new super-districts overlap the old nine—or overlap enough of the old nine districts that these same nine districts instead of electing nine Senators will elect twelve Senators. In other words, they will still elect a—well, they will elect under 574 an even safer majority of the Senate than under Article 2, Section 2.

Now, this is again combined with the existing disparities between one Senatorial district and another. Like Article 2, Section 2, the apportionment of Senators is made to districts, as I read the law, and not to counties other than the fact that there will be a certain number of the

districts in the counties. But the districts are created first in the amendment.

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And so far as I can tell there is no basis certainly spelled out in the Constitution or in 574 giving any basis that one can observe for putting these districts where they are placed. Retaining the old section of the Constitution, the old paragraph of the Constitution which described the metes and bounds of these districts, which again had no basis that one could observe, to tell you whether population was to have been the original factor, or whether area was to have been the original factor, or whether a formula combining these, or something else, there just isn't anything there that tells you why it was done this way. I consequently cannot explain why this arrangement existed in the first place, or why it exists now.

This provision of 574 increasing the size of the Senate and awarding two additional Senators each to Kent and Sussex would appear to be just a means of offsetting the increase that New Castle got in the House.

Q. As a result of this additional four Senators down in the lower two counties, Doctor, are you able to calculate the representation as it now exists in the three counties, the percentage?

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The Witness: The old law. I am sorry.

A. (Continuing) Under the old law, well, the same percentage of the population will control the Senate under the new provision as under the old provision, the same percentage of the population.

As far as the total representativeness of the Legislature is concerned the situation would move, this would move Delaware I think on the scale I mentioned a while ago from 48th up to about 44th.

By Mr. Theisen:

Q. 44th of the 50 in the Union?

A. Yes. This takes into account in looking at the scale the changes that have been made in apportionment of the Georgia Legislature and the Maryland Legislature.

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By Mr. Theisen:

Q. Doctor, I gather from your testimony of majority rule that you would predicate representation in a state legislature upon population primarily, would you not?

A. Yes. I think population, as I said yesterday, is the overriding criterion. Mathematical exactitude is not a practical possibility. The objective, I think, should be to get as close to population as can be obtained so that the legislature is a fairly faithful reflection of the population that it is to represent.

Q. And is this limited to the House alone, or is it also the Senate of a state assembly?

A. I think it must be extended to both branches of a bicameral state legislature. The reason for this is that in a state as contrasted with the post hoc theory of the Federal Union which resulted from a compromise, the theory of Federal representation came after the fact rather than before it, but

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the representation in both the House and Senate in a state legislature relates directly to the people of the state.

In other words, the representative right of the citizen is cut in half, or his legislative power is cut in half; half of it goes to one House, and half of it goes to the other House of the legislature, and if a majority of the population is by an apportionment system, or some other device, prevented from even having the opportunity to control both

Houses of the legislature, I think then that that House has gone beyond what I would describe as meeting with some fairly basic assumptions about representative government.

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By Mr. Theisen:

Q. Dr. Hanson, having expounded on the basic purposes of a representative government and the functions of a representative legislature do you find any relation at all between those basic purposes and the amendment to House Bill 574?

A. I do not. 574 creates a situation which perpetually gives to the two lower counties of Delaware control of the State Senate whatever their population might be, and not only control, but two-thirds control. If their population—if existing trends would continue and their population by the next census instead of being 30 per cent is 20 per cent, they would still have two-thirds, and if by the next census it is 10 per cent they would still have two-thirds.

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By Mr. Theisen:

Q. Dr. Hanson, there has been some discussion while Dr. Dolan was on the stand and I suppose we will hear it again: Would you as a political scientist or as a student of government care to comment on the question of whether one finds any Federal analogy whatsoever in state representative government?

A. I can find none. I mean I find none at all. It seems to me that the Federal analogy just can't be applied

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to the states from the basis of legal or constitutional reasoning. I don't think it can be applied to the states from the aspect of historical perspective, and certainly it can't

be applied to the states from the point of logic dealing with the way in which a state is composed. The Federal analogy is interesting mainly because of the manner in which it has flowered in state government. It is interesting to note that at the time the Constitution was written in 1787 the Congress under the Articles of Confederation passed a northwest ordinance providing for proportionate representation. As early as 1635 Massachusetts had anticipated by two hundred years the Reform Act in Great Britain by placing a representation in its legislature on a population basis. A number of the states at the time the Union was formed did use population as the basis in both Houses or like Delaware were in a situation where the ostensible use of another factor did not matter, because population was quite similar between the counties. Maryland was another case in which the deviation between the largest and smallest county did not occur at the time of the formation of the Union. In fact, one of the things that the study of the Advisory Commission on Inter-Governmental Relations points out is that the original Constitutions of 36 of the states used population alone or nearly alone with only one—with only one or several minor varia-

tions as the basis of representation in both Houses.

The use of the Federal analogy in state government began not with state government, but with the growth of cities, and it has been used as something on which to pin the under-representation of cities or urban areas, as is now the case, including the metropolitan suburbs, to pin the under-representation of these areas in the State Senate. I think that theorization about this comes after the fact. You do it and then you explain it by saying this is an application of Federal analogy.

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By Mr. Theisen:

Q. Dr. Hanson, right before the recess you were discussing as a political scientist the question of whether you

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found any Federal analogy in state representative government. I think you were in the middle of that answer, were you not?

A. Yes. Well, I said that I could find none. The Federal analogy as it is commonly used is largely I think an excuse for the over-representation of some and the under-representation of others. I think it does not take into account basic differences between a unitary state and a Federal Union of states. It does not take into account the resulting difference in the nature of the representative process in these two kinds of governmental organizations.

Aside from the legal and theoretical aspects of it, the practical side not only discriminates, but it is important, I think, to understand the considerable difference which exists between the constituency of a United States Senator even from a small state, or small in population, such as Oklahoma or Nevada or Arizona, in which there is vast territory sparsely settled—his constituency is still composed largely and in some cases in the majority of voters who come from urban or metropolitan areas within that state.

So even though there is a mathematical disproportion of representation in the United States Senate, the interests which tend to be represented offset it, and if you look at the effect of it as contrasted with the effect of the application of the Federal analogy to rural districts or to

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rural counties in a state, you get a much different kind of legislative behavior by and large from a United States

Senator from a rural, or so-called rural state, than from a State Senator from a rural county or a rural district.

Q. Then I assume you find no basis for the Federal analogy being applied to Delaware?

A. I could find none at all. The counties are apparently like counties in other states that are sub-divisions of the state. I think the very fact that in the stipulation of facts or the pre-trial statement that for every county power there is listed a state statute is a rather clear indication that the powers that the counties have in Delaware are not plenary powers; they come from the state. I can see no basis.

Moreover, aside from the absence of this kind of a basis, equality of representation among the counties in Delaware would result in just the thing that I think shouldn't occur in state government, and that is to create a situation in which a minority, and probably a diminishing minority, of the population will have a perpetual control of the legislature, or at least of one House of the legislature. This is to totally disregard population in one House. It creates a Senate whose basic constituency is almost unalterably opposed to the basic constituency of the House, and this carries the

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question of checks and balances I think to the point of being ridiculous.

The value, as I see it, of a bicameral legislature is that it affords a wider opportunity to represent the cross-currents that exist in the population, political cross-currents. When you use one House, you necessarily create an arbitrary system of districts of one kind or another and you are unable to bring together some of the communities of interest that it is possible to bring together by affording a wider constituency in a second House with a smaller number of people who run from broader constituencies. It slows down the legislative process, as Dr. Dolan pointed out,

sometimes too much, perhaps, but it has the effect, I think, the salutary effect of providing two channels of access for the population to the legislature.

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CROSS-EXAMINATION.

By Mr. Bove:

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Q. Now, do you still fail to see an analogy between House Bill 574 and the Federal plan?

A. Yes. May I explain why?

Q. Yes.

A. First of all, again the representative districts are created as the units to which the seats in the House are to be apportioned. The seats in the House are not apportioned to counties as such. There is nothing in 574, even assuming the validity of the analogy between the Federal Congress and the state legislature, there is nothing in 574 which says that each county shall be guaranteed one representative although the number are to be apportioned on the basis of population. This would be quite a different thing from 574.

Moreover, even though the effect of 574 is to place an equal number of Senatorial districts, either clear districts or super-districts, in each of the counties, again they are not elected from the county nor representatives of the county but representatives of the district within which they are elected, which is again considerably different from the practice in the Federal Senate or the practice in the states, the six states which employ the Federal analogy of one to a county or two or more to a county.

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Mr. Bove: May it please the Court, at the pre-trial conference counsel for all of the defendants had sug-

gested to the Court that the Court perhaps make some analogy between this case and, if your Honor will recall, I mentioned a patent case where the issues are found and then a separate hearing is held on the matter of damages, and I had suggested to the Court, and the Court did reject it then, that a similar situation be made to exist here where the Court would render its opinion on the validity or invalidity of House Bill 574, or of any portion thereof, and that then counsel for both sides, in the light of that opinion, would have the opportunity to submit plans.

I would like to submit to the Court that we have had some thoughts and some assumptions, some of which were in conflict on the only plan submitted by either of the parties, and I am not clear yet on it and I am not sure that it squres with other constitutional provisions.

So that on behalf of all of the defendants, your Honor, I would like to make the same application now that we

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made at the pre-trial conference when your Honors did not follow——

Judge Biggs: Well, now, let us see precisely what this is. You suggest that we decide the constitutionality, or lack of it, of the new constitutional provision?

Mr. Bove: Yes, sir.

Judge Biggs: And then we do what?

Mr. Bove: And that if your Honors conclude it is invalid or that some part of it is invalid, that your Honor furnish us some guides, and then give us an opportunity—by us I mean the parties—to come into the Court and to present various plans in the light of the guides furnished by the Court, if it is necessary for the Court to furnish guides.

Judge Biggs: And then counsel working together and/or separately— I take it working separately and together—would try to evolve a plan? Do you think that you would reach any substantial conclusion any more than the Governor's Commission did?

Mr. Bove: I don't think that the plaintiffs' attorney and the various attorneys for the defendants could get together if it was necessary to get together after the Court's opinion to formulate a plan, but I do think that counsel for the defendants in the light of any guides which the Court found it necessary to give us could get together and submit

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some plans to this Court.

* * *

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DR. JAMES K. POLLOCK

[*Professor of Political Science at the University of Michigan, called as a witness on behalf of the defendants, being duly sworn, testified as follows:*]

CROSS-EXAMINATION.

By The Court and Mr. Battaglia:

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Q. The Court handed down a very tentative plan and asked that the experts examine it. Did you examine it?

A. I did, but I hesitate to pass any judgment on it, because of my lack of knowledge of the situation in Delaware. From the appearance of it it seems entirely logical to me.

By Judge Biggs:

Q. We would like to have you express your views without hesitancy, Doctor.

A. Yes.

By Judge Wright:

Q. While you are here, Doctor, do the best you can.

A. I don't have it in front of me at the moment. But it met the standard requirement for apportionment of the areas which you are doing. It looks as if the districts are substantially equal without too much deviation. There would in some cases be a few thousand, but this is unavoidable, and if you are assuming a population basis for this House, which is

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the case, it looks to me to be an entirely satisfactory plan.

By Judge Layton:

Q. May I interrupt you? You say assuming population basis?

A. Yes.

Q. The experts for the other side, as you know, have testified that the predominant factor in democratic elections is that legislatures should be controlled or elected, rather, on a strictly population basis. That is, as near as possible on a population basis. Now, do you take that view?

A. I take that view for at least one House.

Q. For one House?

A. Yes, and I believe that if you are doing one House on population you should do it as strictly on the basis of population as possible, and it seems to me your plan does this.

* * *

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Q. And if I were to show you Plaintiffs' Exhibit 5, which is a representation of the distribution of population per representative district, you would find this to be illogical according to your previous statement?

A. If the assumpiton is it is to be on population it certainly is. That is what I said in replying to the Judges' plan. You don't find that great spread or deviation.

By Judge Wright:

Q. Do I understand you do believe that it is important to have one branch of the legislature on population?

A. Yes, sir. I thought I said that earlier.

(400)

By Mr. Battaglia:

Q. And if I were to show you what is Plaintiffs' Exhibit 15 and were to ask you and did ask you do you find anything irrational——

A. The same thing.

(426)

By Mr. Battaglia:

Q. Doctor, didn't this impinge on the county sovereignty, combining two counties that you had out in Michigan?

A. Well, there is no such thing as county sovereignty. I don't know what you mean.

Q. Your statement is that there is no such animal as county sovereignty?

A. Why, the states under our Federal Constitution are supposed to be sovereign, as you define "sovereignty" in this country. Certainly not the counties, no.

Q. Thank you, sir.

A. Counties have a good deal of their own tradition and their own habits and their own authority, but they are not sovereign.

Q. Doctor, a few minutes ago you said that the three counties in Delaware apparently have a great deal of continuity. What did you mean by that term, sir?

A. Well, I happen to have been born in Pennsylvania and I happen to remember my history that Delaware has

been here a long time, and these counties, I believe, have not been changed, their boundaries, in that whole period. That is what I meant.

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LEON DE VALINGER, JR.

[*State Archivisit of the State of Delaware, a witness for the Appellants, Defendants below, testified in part as follows:*]

CROSS-EXAMINATION.

By Mr. Theisen:

Q. Mr. De Valinger, I believe you said that you edited or rather worked with the first census figures of 1790?

A. Yes, sir.

Q. You are then faimliar with the populat on, are you not, of all three of the counties at that time?

A. I was familiar with those figures then, when I worked with them.

Q. Are you not now familiar with them?

A. No, I am not.

Q. Well, do you have a recollection as to whether they were pretty near equal in number?

A. At 1790 they were, approximately.

Q. Well, weren't they actually 18,000, 19,000, in that area, each of them?

A. In the 2,000 bracket.

Q. I beg your pardon?

A. I would say within 2,000 bracket.

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By Mr. Theisen:

Q. Mr. de Valinger, in the work "Delaware, the First State", which I am sure you are familiar with, the one edited by Mr. Reed——

A. Yes.

Q. On page 261 of that volume the census figures for 1790 for the three counties are as follows: New Castle, 19,686; Kent County, 18,920; Sussex County, 20,488; a total population of 59,094. Is that your recollection? Does that refresh your recollection, those figures?

A. That is the reason I said about 2,000.

Q. Are you familiar with the population figures of the three lower counties at the time, let's say, of independence?

A. No, I am not. I wouldn't want to rely on my memory for that.

Q. Well, does your memory serve you well enough to say that they were about equal in population at that time also?

A. Yes.

* * *

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Q. May I take you back a few years prior to the Declaration of Independence and call your attention to the end of the seventeenth century and frame my question to the lower counties and ask you if you can recall and recite to the Court what the grievances were that led to the separation of the three lower counties from the proprietary Penn colonies?

A. May I read from this volume?

Q. Well, I am asking you first, Mr. de Valinger, as a historian, do you know what those grievances were?

A. Yes, I know what some of them were.

Q. Well, may I ask you if it wasn't a fact that one of the determining grievances for separation from Penn-

sylvania was the fact that this burgeoning Philadelphia metropolis was demanding more representation in the Assembly?

A. That is not my interpretation of it.

Q. May I read to you from Reed's book, page 260, and ask for your comments upon this. The author states, beginning on the bottom of page 260 and running over to 261:

> "Another obstacle to literal majority rule in Delaware government remains to be mentioned, the lack of representation according to population. This is true of

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> both Houses of the Legislature, and the reason for it is historical. In the Assembly set up by Penn which introduced representative government into Delaware, each county was allowed an equal number of members, and so it has remained ever since. When at the end of the seventeenth century the growing metropolis of Philadelphia demanded increased representation, the Delaware county seceded and set up a separate legislature in 1704."

Does that refresh your recollection as to one of the reasons, one of the compelling reasons, why they seceded and set up their government?

• • •

A. I will be glad to answer that and say that on April 12 of 1701 the Charter of Privileges was granted by proprietor Penn, and one of the privileges was that if there was a separation of the three lower counties from Pennsylvania, from the province of Pennsylvania, the upper counties might be allowed to expand their representation in their own Assembly,

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and the Delaware—or three lower county Assembly to be established at New Castle could determine their own representation. But this was not the cause of the separation; this was conditional on the fact if they did do that.

By Mr. Theisen:

Q. Was this one of the grievances that led to the separation.

A. It may have been one of the grievances.

Q. Now, then, at that time, and until 1776, the three lower colonies were, as I understand from the history and from your testimony, they remained as proprietary holdings of the Penn family, did they not?

A. They did.

Q. So they were not at that time, and had not been until that time, any sovereign power, had they?

A. It depends upon the definition of "sovereignty" in this instance.

Q. They were owned by Penn and his family, weren't they?

A. They were owned by them.

Q. And they were governed by the representatives—the top governing official was a direct representative of William Penn's family, was it not?

A. Yes, but there were breakdowns in the Penn system;

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for example, the whole quit rent system that they had imposed broke down, and there were other aspects of it.

Q. By the way, where was Thomas McKean from?

A. New Castle County.

Q. Where was George Read from?

A. New Castle County.

Q. So that the three lower counties were not represented in the Continental Congress by representatives from each of the three lower counties, were they?

A. Not at that particular time.

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HOUSTON WILSON, ESQUIRE.

[A member of the Governor's Bipartison Reapportionment Committee and Chairman of its Subcommittee, a witness for the Appellants, Defendants below, testified in part as follows:]

Q. As I understand what you worked out in House Bill 574 was that you would keep the Senatorial districts in New

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Castle County, you would add two in Kent, and two in Sussex, and you would add two in each of the lower counties by dividing the existing counties into districts, you took half of the—you took five districts from each county, did you not, or took ten districts, I am sorry, you gave five to each district in each county?

A. That is right, on an east-west division.

Q. Did you compute at any time the population either one of the four districts?

A. No.

Q. You did not give any consideration, did you,——

A. You want to know how that was done?

Q. No. I asked you a question. Did you give population any consideration in making that division?

A. None at all.

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(598)

Q. Mr. Wilson, a portion of House Bill 574, and the last bit of it, the tail end of it, provides that notwithstanding the provisions of the bill about subdividing districts with 15,000 population or more, that for the purposes

(599)

of any Constitutional Convention that was called, the delegates—you remember this?

A. I am with you now.

Q. —the delegates should remain as they were under the Constitution of 1897 and should not be affected by the provisions of House Bill 574.

A. Yes.

Q. Now, I ask you, what was the discussion, if any? What was the intent of the committee in making that recommendation, if the committee made that recommendation?

A. Why, some of the committee from the lower part of the State expressed some fear as to whether or not the reapportionment of the House under our plan would automatically result in a reapportionment of the delegates to a Constitutional Convention that we were proposing to call. They wanted to make it exceedingly clear that it would not. And so in order to arrive at what I felt and which the committee felt was one of these historic compromises for which this nation is rather famous we spelled it out, that it would not affect the delegates' strength to a Constitutional Convention that we were proposing to have called.

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Request of Counsel for Appellants for establishment of guidelines by the Court in the event the apportionment provisions are held unconstitutional:

FRANK O'DONNELL, ESQUIRE

[*Attorney for the Department of Elections for New Castle County and the Clerk of Peace for New Castle County:*]

Judge Biggs: Let me ask you one question in connection with your objection. Assume this Court should find that the new amendment is unconstitutional in the light of

the 14th Amendment of the United States Constitution, what then would you conceive it would be the duty of the Court to do?

Mr. O'Donnell: I would now be stating my views, I have not consulted——

Judge Biggs: Give us your views.

Mr. O'Donnell: My views are that if the Court should find that to be unconstitutional, that the Court should issue a mandate requiring the State to be redistricted in accordance with certain criteria, the lines to be adopted by the legislature. I think the Court might properly in its order give a reasonable time for compliance with the Court's order. If the Court finds that the order is not complied with, then more drastic measures might be in order, but that is the basis of our objection, that this question is not before the Court.

* * *

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Mr. O'Donnell: Yes. That is my idea of what we were referring to in Paragraph 13. I did not think and I still do not think that the fine lines of how the districts should be drawn is the function of the Court. I feel that and I thought then that you were ultimately giving a decision where you would give us the general guides that you thought were appropriate and not the fine lines on the map of where the districts should be.

Consequently we have not and did not prepare any testimony in opposition to the lines as laid down this afternoon.

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JANUAR D. BOVE, JR.

[*Former Attorney General, Attorney for the State Election Commissioner, and the Department of Elections for Sussex County:*]

Mr. Bove: May it please the Court, your Honors will recall that at the pre-trial conference counsel for the defendants did raise the question of the Court's proceeding by analogy to a patent case where the Court finds either infringement or validity or both and then goes into a hearing on damages. We had suggested that if the Court found either Article 2 of Section 2 or House Bill 574 and also House Bill 3 unconstitutional in any respect, that the Court establish some guide lines on apportionment and then hold a hearing on the form of relief to which the plaintiffs would be entitled if the Court found unconstitutionality. The Court did at the pre-trial reject that suggestion.

During the course of these proceedings, if your

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Honors will recall, I renewed our application in that respect and your Honors reserved decision on it, as I understood it. Do I now understand that your Honors are denying that application?

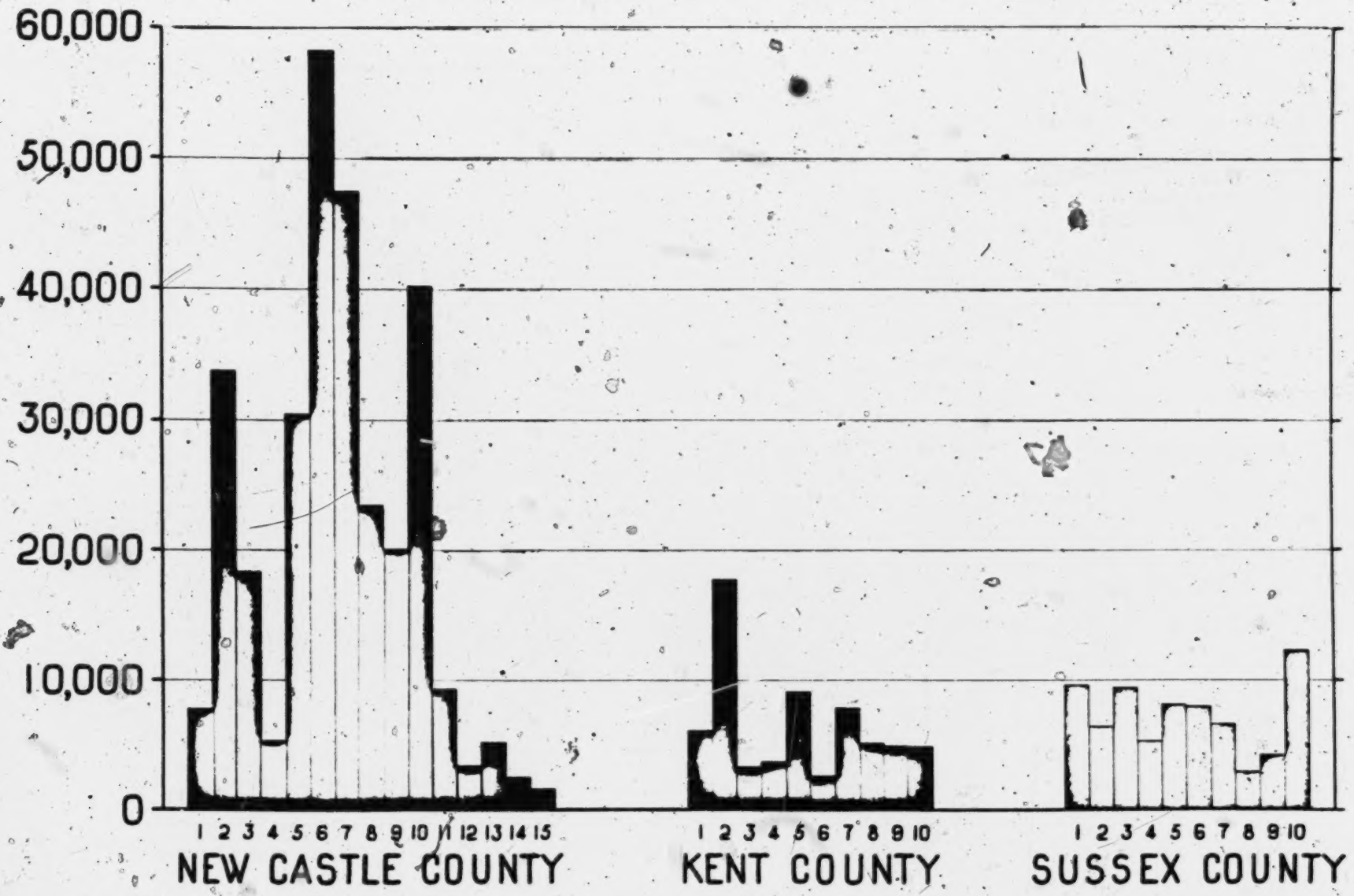
Judge Biggs: No. That was an oral application, was it not?

Mr. Bove: Yes, sir.

Judge Biggs: Mr. Bove, I would think it would be desirable, since the record has not yet been written, and at least I am not entirely clear as to what your motion was, if you presented it now or presented it during the course of the next 48 hours by way of a written motion.

Mr. Bove: Yes, your Honor.

1960 POPULATION OF DELAWARE
BY REPRESENTATIVE DISTRICTS

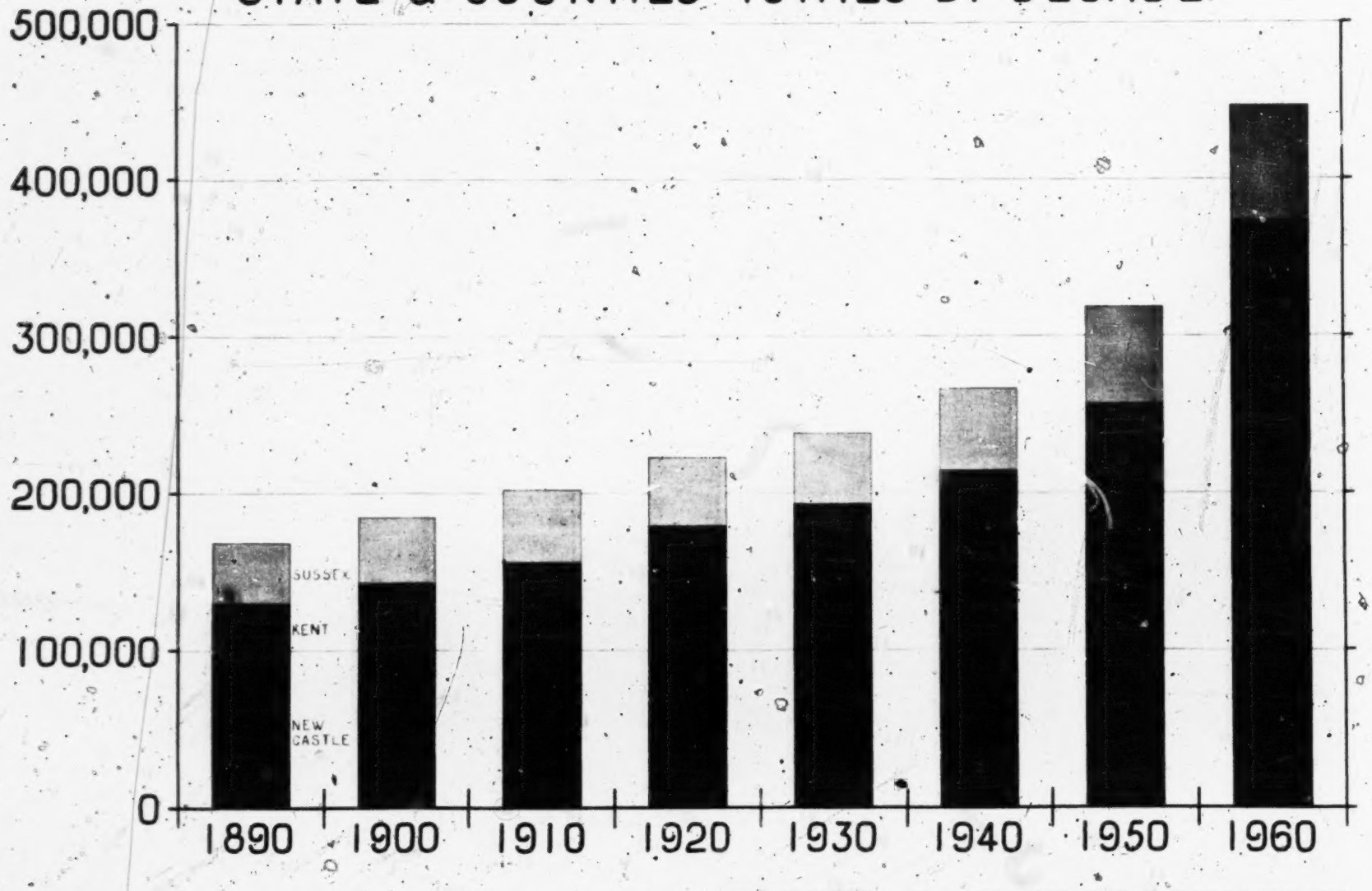


SOURCE: U.S. DEPT. OF COMMERCE
BUREAU OF THE CENSUS

POPULATION OF DELAWARE

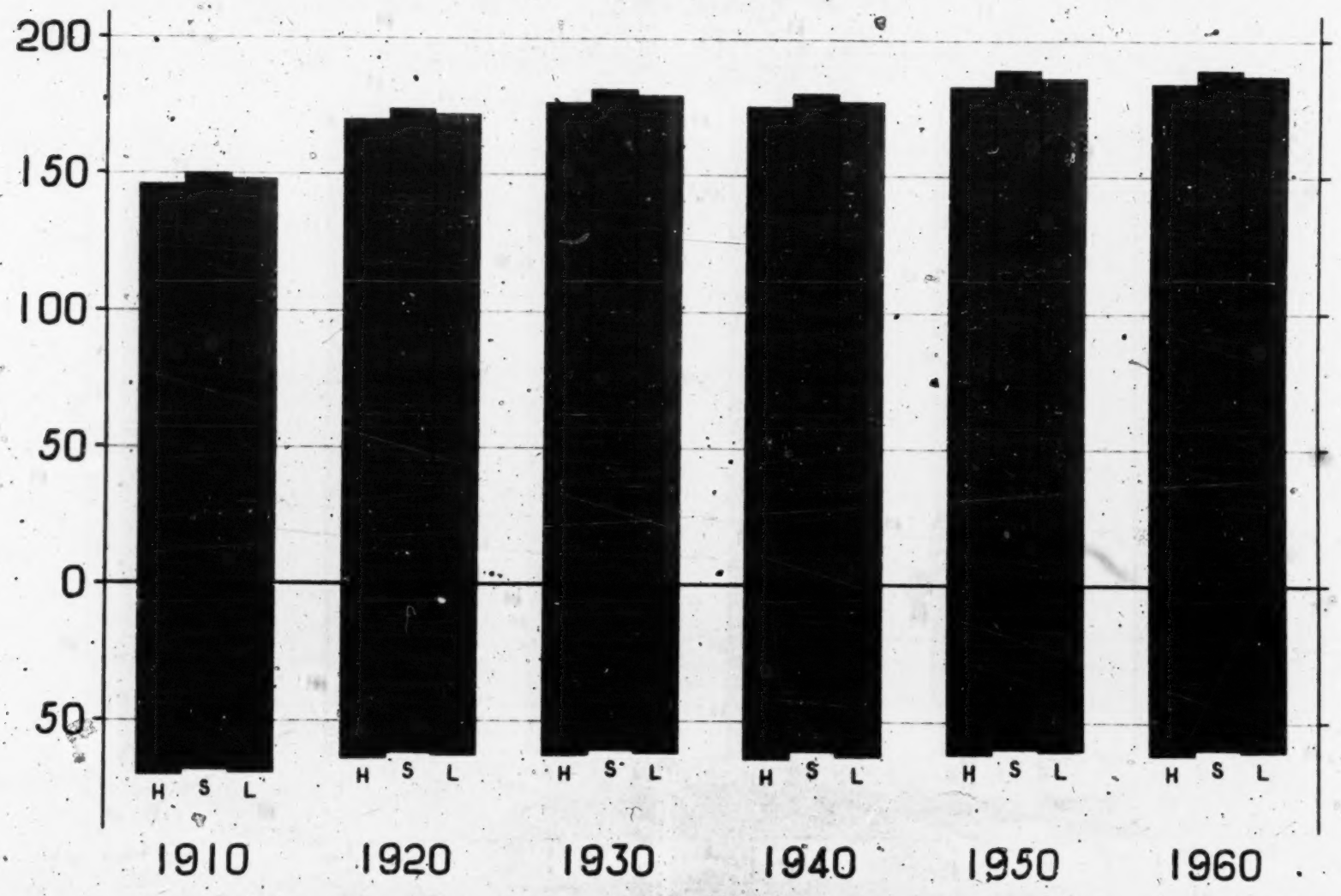
1890 THROUGH 1960

STATE & COUNTIES TOTALS BY DECADE



SOURCE: U.S. DEPT. OF COMMERCE
BUREAU OF THE CENSUS

AVERAGE VALUES OF THE VOTE FOR REPRESENTATION AS PERCENTAGES OF THE STATE-WIDE AVERAGE

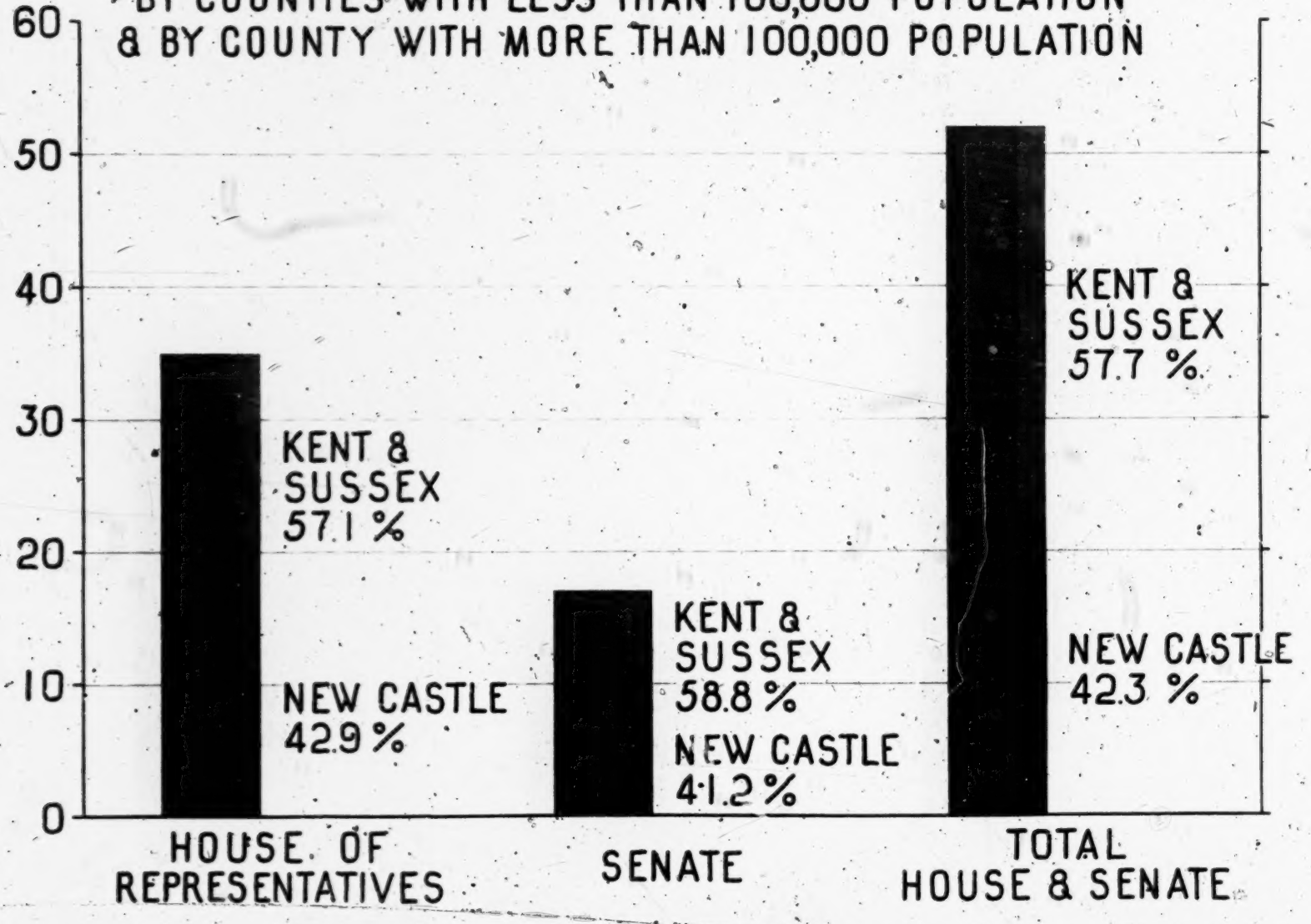


BY COUNTIES WITH LESS THAN 100,000 POPULATION
& BY COUNTIES WITH MORE THAN 100,000 POPULATION

SOURCE:
"DEVALUATION OF THE URBAN & SUBURBAN VOTE"
PAUL T. DAVID & RALPH EISENBERG

REPRESENTATION IN GENERAL ASSEMBLY OF DELAWARE

BY COUNTIES WITH LESS THAN 100,000 POPULATION
& BY COUNTY WITH MORE THAN 100,000 POPULATION

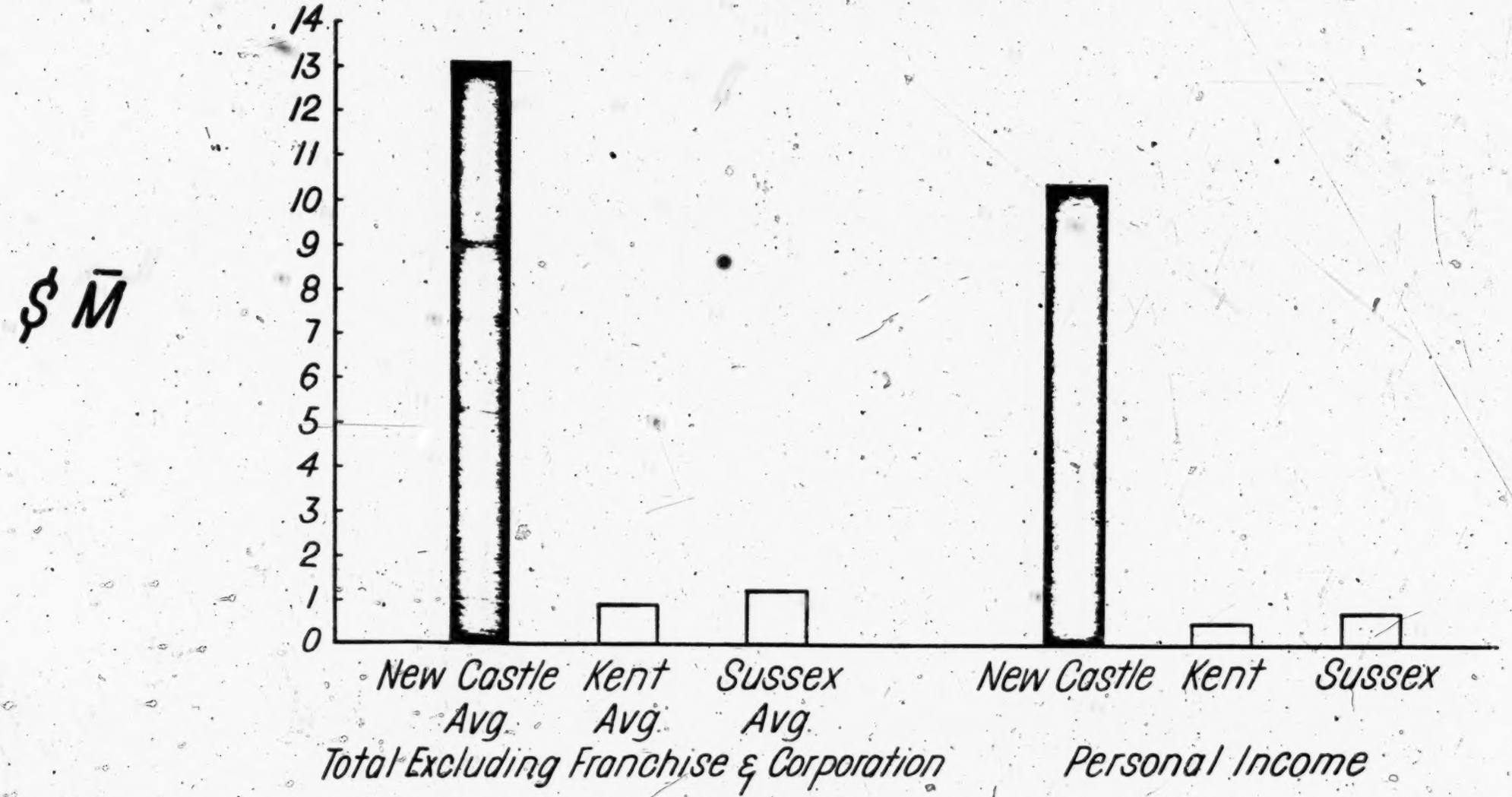


SOURCE: DELAWARE STATE CONSTITUTION

Plaintiffs' Exhibit, No. 3

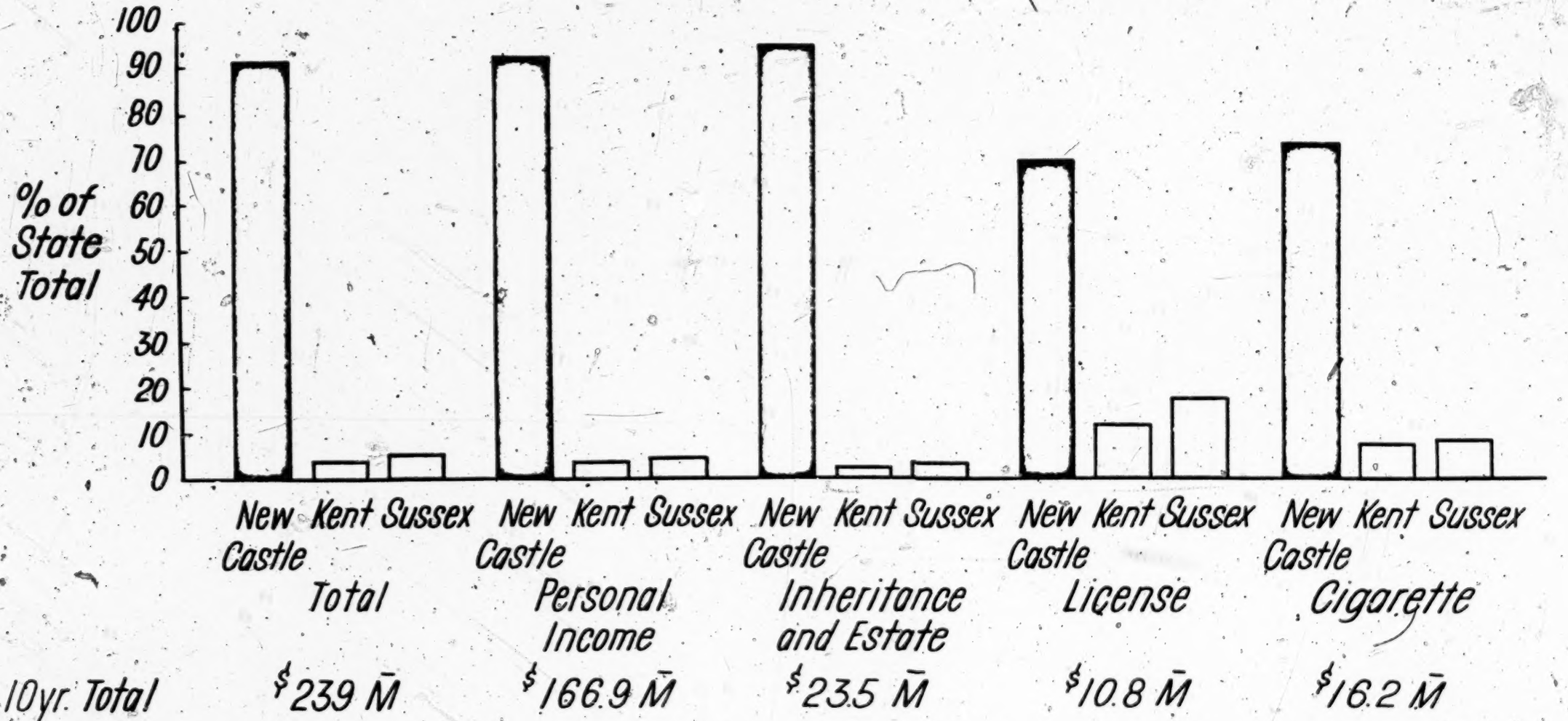
COLLECTIONS BY DELAWARE STATE TAX COMMISSION PER STATE REPRESENTATIVE

(BASED ON 10 YEAR TOTALS)

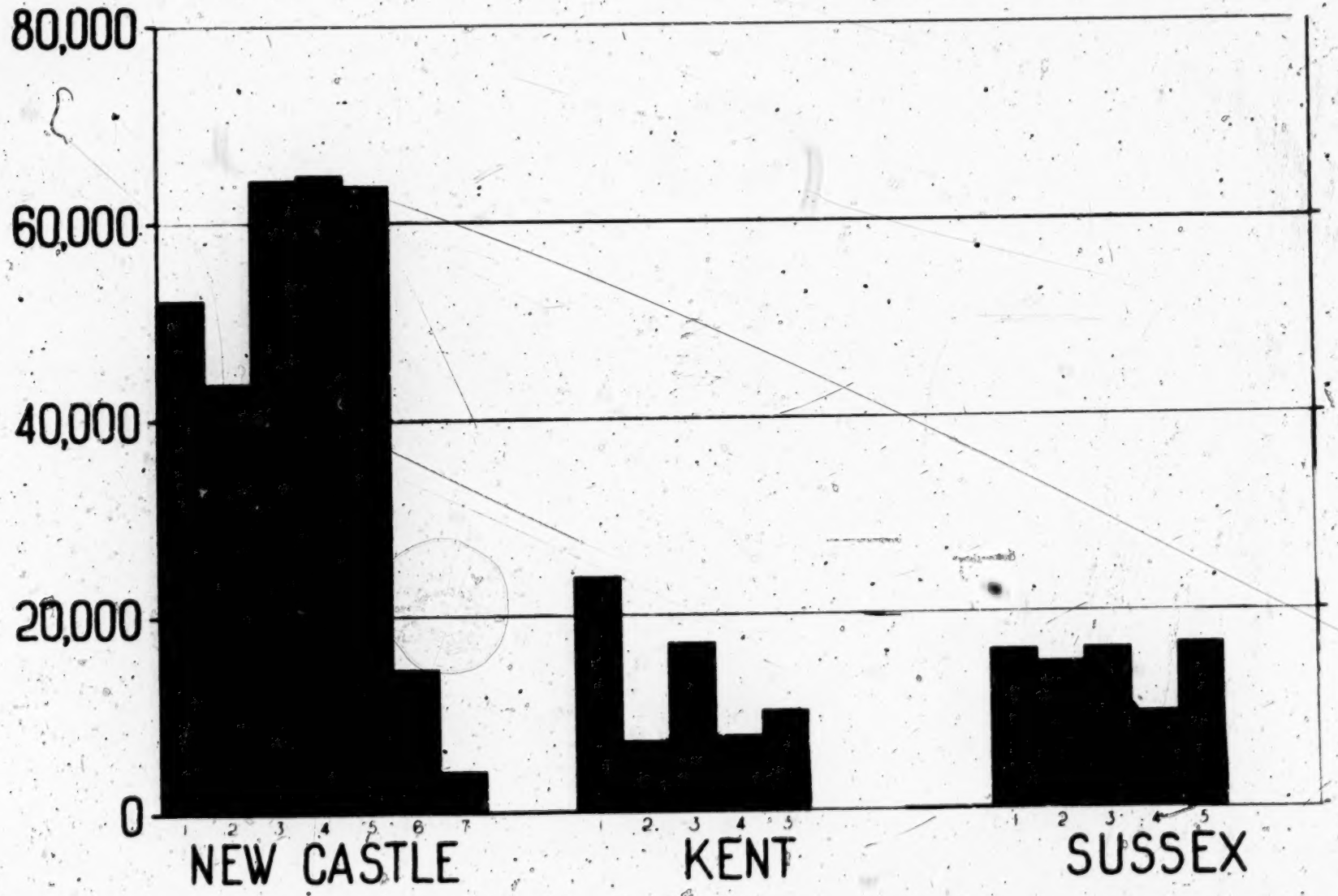


COLLECTIONS BY DELAWARE STATE TAX COMMISSION

1952 - 1961



POPULATION DELAWARE SENATORIAL DISTRICTS - 1960 CENSUS

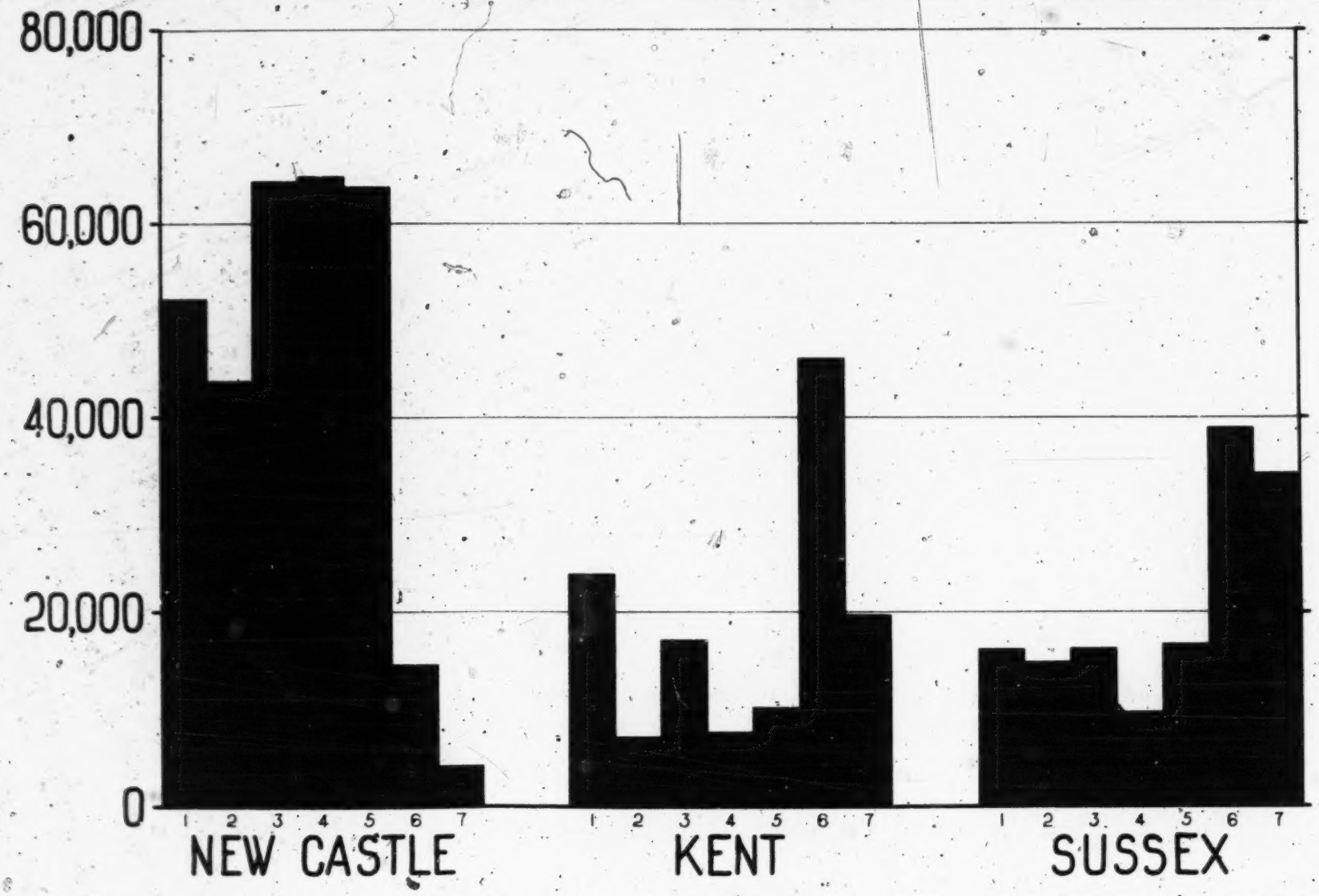


SOURCE 1960 CENSUS OF POPULATION BUREAU OF CENSUS

DELAWARE HOUSE OF REPRESENTATIVES
PROPOSED DISTRICTS BY POPULATION
H.B. 574 – 121 ST GENERAL ASSEMBLY

SOURCES: 1) HOUSE BILL 574.
2) 1960 CENSUS OF POPULATION BUREAU OF CENSUS

DELAWARE STATE SENATE
PROPOSED DISTRICTS BY POPULATION.
H.B. 574 - 121ST GENERAL ASSEMBLY



SOURCES: 1) COMM. OF 39-"REAPPORTIONMENT IN DELAWARE" 8/2/62
2) HOUSE BILL 574
3) 1960 CENSUS OF POPULATION BUREAU OF CENSUS